Supreme Court, U.S.
FILED
971988 MAY 26 1998
OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

VERNA EMERY,

Petitioner,

v.

AMERICAN GENERAL FINANCE, INC., AMERICAN GENERAL FINANCE CORP., and JOHN DOES 1-10,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

DANIEL A. EDELMAN
Counsel of Record
CATHLEEN M. COMBS
JAMES O. LATTURNER
TARA L. GOODWIN
JAMIE S. FRANKLIN
EDELMAN & COMBS
135 South LaSalle Street
Suite 2040
Chicago, IL 60603
(312) 739-4200
Attorneys for Petitioner

Midwest Law Printing Co., Chicago 60610, (312) 321-0220

68 pp

QUESTIONS PRESENTED FOR REVIEW

1. In a claim under the RICO statute, 18 U.S.C. §§1961 *et seq.*, can a corporate subsidiary constitute a RICO person when the RICO enterprise is defined as a group of affiliated corporations that includes the parent corporation and the other subsidiaries?

2. In a claim under the RICO statute in which the plaintiff has not been permitted to conduct discovery, is it proper to dismiss the claim because the plaintiff could not identify the individual RICO persons, but, instead, identified them as "John Does"?

3. In a claim under the RICO statute based on mail fraud, is it proper to dismiss a complaint for failure to plead a pattern of racketeering activity pursuant to Fed.R.Civ.P. 9(b) when the mail fraud is based on the mailing of form documents and the identity of other recipients is within the sole control of the defendants?

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED FOR REVIEW i

TABLE OF CITED AUTHORITIES v

PREVIOUS OPINIONS 1

STATEMENT OF JURISDICTION 2

STATUTES INVOLVED 2

18 U.S.C. §1961—Definitions 2

18 U.S.C. §1962—Prohibited activities 3

STATEMENT OF THE CASE 3

Factual Background 3

RICO Combinations Alleged in Second Amended Complaint 5

Procedural History 7

ARGUMENT 8

I.

THE SEVENTH CIRCUIT'S DECISION IMPROPERLY PRECLUDES CORPORATE SUBSIDIARIES FROM CONSTITUTING RICO PERSONS 8

A. The Seventh Circuit's decision contradicts the plain language of the RICO statute 8

B. The Seventh Circuit's decision conflicts with decisions of other circuits and with a previous decision of the Seventh Circuit itself 11

II.

THE SEVENTH CIRCUIT IMPROPERLY DISMISSED THE RICO CLAIM AGAINST THE INDIVIDUAL DEFENDANTS 14

III.

THE SEVENTH CIRCUIT IMPROPERLY HELD THAT ALLEGATIONS OF MAIL FRAUD BASED ON DEFENDANTS' TRANSMITTAL OF NUMEROUS COPIES OF THE SAME FORM DOCUMENT DID NOT CONSTITUTE A PATTERN OF RACKETEERING 15

CONCLUSION 17

TABLE OF CONTENTS OF APPENDIX

PAGE

Seventh Circuit Opinion ..... App. 1

Seventh Circuit Denial of
Petition for Rehearing ..... App. 9

District Court Opinion ..... App. 10

Second Amended Complaint ..... App. 19

TABLE OF CITED AUTHORITIES

Cases: Page(s)

Ashland Oil, Inc. v. Arnett,
875 F.2d 1271 (7th Cir. 1989) 12

Davis v. Mutual Life Insurance Co. of New York, 6 F.3d 367 (6th Cir. 1993) 12

Emery v. American General Finance, Inc.,
134 F.3d 1321 (7th Cir. 1998) ..... *passim*

Fitzgerald v. Chrysler Corporation,
116 F.3d 225 (7th Cir. 1997) 13

Gagan v. American Cablevision, Inc.,
77 F.3d 951 (7th Cir. 1996) 12

Haroco, Inc. v. American National Bank and Trust Co. of Chicago,
747 F.2d 384 (7th Cir. 1984) 11

Hubbard v. United States,
514 U.S. 695 (1995) 10

Jaguar Cars, Inc. v. Royal Oaks Motor Car Co., 46 F.3d 258 (3d Cir. 1995) 12

Landry v. Air Line Pilots Association Int'l,
901 F.2d 404 (5th Cir. 1990) 12

Libertad v. Welch,
53 F.3d 428 (1st Cir. 1995) 12

Michaels Building Company v. Ameritrust Company, N.A., 848 F.2d 674 (6th Cir. 1988) ... 16

Miranda v. Ponce Federal Bank, 948 F.2d 41 (1st Cir, 1991) 12

Napoli v. United States, 32 F.3d 31 (2d Cir. 1994) 12

New England Data Serv., Inc. v. Becher, 829 F.2d 286 (1st Cir. 1987) 16

Salinas v. United States, ___ U.S. ___, 1997 U.S. LEXIS 7332 (1997) 10

Schiffels v. Kemper Fin. Serv., Inc., 978 F.2d 344 (7th Cir. 1992) 16

Sedima v. Imrex Co., 473 U.S. 479 (1985) 13

Sever v. Alaska Pulp Corp., 978 F.2d 1529 (9th Cir. 1992) 12

United Healthcare Inc. v. American Trade Ins., 88 F.3d 563 (8th Cir. 1996) 12

United States v. Horak, 833 F.2d 1235 (7th Cir. 1987) 12

United States v. London, 66 F.3d 1227 (1st Cir. 1995) 12

United States v. Oreto,
37 F.3d 739 (1st Cir. 1994) 12, 15

United States v. Robinson,
8 F.3d 398 (7th Cir. 1993) 12

Yellow Bus Lines, Inc. v. Drivers, Chauffeurs and Helpers Local Union 639,
913 F.2d 948 (D.C. Cir. 1990) 12

Statutes:

18 U.S.C. §§1961 *et seq.* ..... i, 7

18 U.S.C. §1961(3) 2, 8, 9

18 U.S.C. §§1961(4) 2, 9

18 U.S.C. §1962(5) 2

18 U.S.C. §1962(c) 3, 8

28 U.S.C. §1254(1) 2

Fed.R.Civ.P. 9(b) ..... i, 14, 15, 16

PREVIOUS OPINIONS

The citations of the official and unofficial reporters of the opinions and orders entered in this case, in reverse chronological order, are as follows:

Seventh Circuit denied petition for rehearing *en banc*: *Emery v. American General Finance, Inc.*, 134 F.3d 1321 (7th Cir. 1998). App. 9.

Seventh Circuit affirmed decision of the District Court for the Northern District of Illinois: *Emery v. American General Finance, Inc.*, 134 F.3d 1321 (7th Cir. 1998). App. 1-8.

District Court for the Northern District of Illinois granted defendants' motion to dismiss and dismissed suit with prejudice: *Emery v. American General Finance, Inc.*, 952 F.Supp. 602 (N.D.Ill. 1997). App. 10-18.

District Court for the Northern District of Illinois granted defendants' motion to dismiss: *Emery v. American General Finance, Inc.*, 938 F.Supp. 495 (N.D.Ill. 1996).

Seventh Circuit denied petition for rehearing: *Emery v. American General Finance, Inc.*, unreported.

Seventh Circuit reversed and remanded decision of the District Court for the Northern District of Illinois: *Emery v. American General Finance, Inc.*, 71 F.3d 1343 (7th Cir. 1995).

District Court for the Northern District of Illinois granted defendants' motion to dismiss: *Emery v. American General Finance, Inc.*, 873 F.Supp. 1116 (N.D.Ill. 1994).

STATEMENT OF JURISDICTION

The Seventh Circuit affirmed the decision of the District Court for the Northern District of Illinois dismissing this suit with prejudice on January 28, 1998. App. 1-8. The petitioner, Verna Emery, timely filed a petition for rehearing *en banc* on February 11, 1998, which was denied on February 24, 1998. App. 9. The petitioner now timely seeks a writ of certiorari. This Court has jurisdiction to review this case pursuant to 28 U.S.C. §1254(1).

STATUTES INVOLVED

18 U.S.C. §1961—Definitions

As used in this chapter [18 U.S.C. §§1961 *et seq.*]—

. . .

(3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

18 U.S.C. §1962—Prohibited activities

. . .

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

STATEMENT OF THE CASE

Factual Background

Verna Emery brought this consumer class action against American General Finance, Inc. ("AGFI"), American General Finance Corporation ("AGFC"), and John Does 1-10, seeking redress for their practice of engaging in mail fraud by "flipping" consumer loans. Ms. Emery's Second Amended Complaint, App. 19-42, describes the defendants' practice of soliciting their current consumers to borrow additional money and extending the additional funds by *refinancing* the existing loans rather than writing new loans.

Ms. Emery initially borrowed $1,983.81 with an annual percentage rate of 36%. The note was secured by miscellaneous personal property. The amount financed included $51 for credit life insurance, $120.82 for credit disability insurance, $64.42 for insurance on the personal property, and $6.00 for purported "non-filing insurance." The note provided that in the event of prepayment or acceleration, finance charges and refunds of unearned insurance premiums would be credited using the "Rule of 78's."

Shortly before January 29, 1993, defendants solicited Emery to borrow additional money. The solicitation, a form letter, purported to be an offer for an additional loan (it used such terms as "[w]e can lend you money" and "I have money to loan" and suggested that "we could write your check on the spot"). The letter did not disclose that if Ms. Emery accepted the offer, she would be *refinancing* her existing obligation. Ms. Emery signed a new note on January 29, 1993 for $2,399.83. Her finance charge was $1,641.28, and her annual percentage rate was 35.96%. The amount financed included $61.75 for credit life insurance, $146.20 for credit disability insurance, $77.99 for insurance on collateral, and $6.00 for purported "non-filing insurance." Another $96.80 of the amount financed was entitled "CU for IN," which Ms. Emery cannot identify. The "Rule of 78's" applied to this new note as well.

Ms. Emery paid *over $800.00 more* for the refinanced loan than she would have paid for a new loan with the same rate for the amount she wished to borrow. Defendants induced Ms. Emery to refinance her existing loan and did not disclose the fact that it would be substantially cheaper for her to simply obtain a second loan instead of refinancing the first loan.

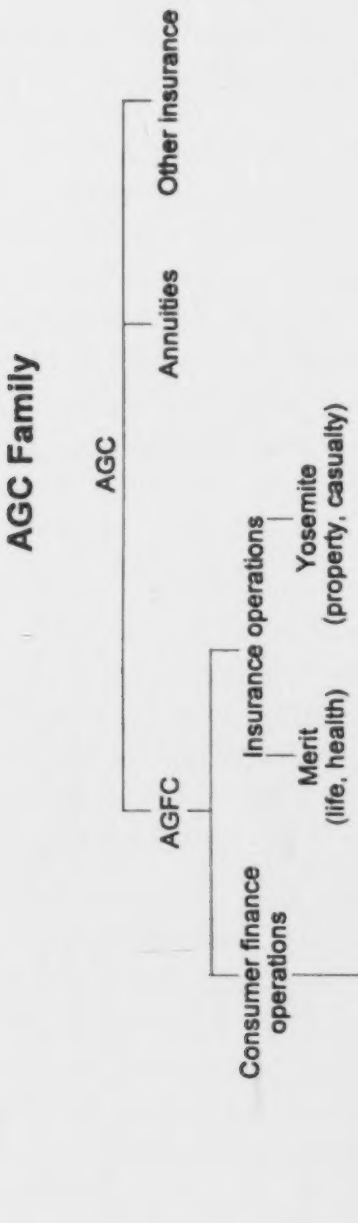
Defendants targeted "blue-collar craftsman, factory workers, and laborers in low density satellite towns and suburbs of small industrial and manufacturing metros" who engage in activities like using chewing tobacco, eating at steak houses, listening to religious radio stations, watching daytime television dramas, installing shocks on their own automobiles, and watching professional wrestling.

RICO Combinations Alleged in Second Amended Complaint

In the case at bar, Ms. Emery alleged *nine different RICO combinations* as the basis for establishing the liability of defendants. Those combinations are as follows:

Count	Person	Enterprise	Relationship to Person
Count I	(a) AGFC	AGC	Parent of person
	(b) AGFC	Corporate group headed by AGC	Parent and corporate family of person
	(c) AGFC	AGFC, AGFI, and other affiliates	Person and person's subsidiaries
Count II	(a) AGFI	AGC	Grandparent of person
	(b) AGFI	Corporate group headed by AGC	Grandparent and corporate family of person
	(c) AGFI	AGFC, AGFI and other affiliates	Person, parent of person and others
Count III	(a) John Does	AGC	
	(b) John Does	Corporate group headed by AGC	
	(c) John Does	AGFC, AGFI and other affiliates	

The corporate structure of the defendants is diagrammed below:



Procedural History

Ms. Emery filed a lawsuit against defendants in the Northern District of Illinois on August 24, 1994 alleging violation of the RICO statute, 18 U.S.C. §§1961 *et seq.*, based on mail fraud. The District Court dismissed Ms. Emery's original complaint on December 21, 1994. The Seventh Circuit reversed, holding that the complaint adequately pled one instance of mail fraud but failed to plead a pattern of racketeering activity as required by the RICO statute. Ms. Emery amended her complaint, and, on remand, the District Court dismissed the First Amended Complaint. Ms. Emery then filed her Second Amended Complaint, which the District Court again dismissed.

In its decision of January 28, 1998, a panel of the Seventh Circuit (Posner, Chief Judge, and Bauer and Coffey, Circuit Judges) affirmed the decision of the District Court, holding that Ms. Emery failed to allege a pattern of racketeering activity and failed to allege a RICO person separate and distinct from the RICO enterprise. Ms. Emery respectfully suggests that the Seventh Circuit (i) improperly limited the scope of both civil and criminal RICO liability by making it virtually impossible for corporate subsidiaries to constitute RICO persons; (ii) improperly dismissed her RICO claim against the "John Doe" defendants; and (iii) improperly found that Ms. Emery failed to plead more than one instance of fraud with particularity and thus did not allege a pattern of racketeering activity despite the facts that (a) the mail fraud was based on standard form documents that defendants had mailed to many people, and (b) the information about who received the fraudulent letters was within the sole control of the defendants. Ms. Emery respectfully

requests that the Court grant her petition for certiorari in this case to resolve these issues.

ARGUMENT

I.

THE SEVENTH CIRCUIT'S DECISION IMPROPERLY PRECLUDES CORPORATE SUBSIDIARIES FROM CONSTITUTING RICO PERSONS.

Of the nine possible RICO person/enterprise combinations alleged by Ms. Emery, five involve situations in which the person is a subsidiary of the enterprise (I(a), I(b), II(a), II(b), and II(c) from the chart above). The Seventh Circuit's decision essentially renders it impossible for a subsidiary to constitute a RICO person. As such, the Seventh Circuit's decision contradicts the plain language of the RICO statute and conflicts with decisions of eight Circuit Courts of Appeal.

A. The Seventh Circuit's decision contradicts the plain language of the RICO statute.

The RICO statute imposes liability on "any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce" who "conduct[s] or participate[s], directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt." 18 U.S.C. §1962(c). Sections 1961(3) and (4) provide the following definitions:

> (3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;

> (4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity . . . .

AGFC and AGFI are both "entit[ies] capable of holding a legal or beneficial interest in property." The two subsidiaries are associated with their parents and conduct part of the affairs of the enterprises, which include the parents. The RICO persons thus satisfy the explicit definition that Congress provided in 18 U.S.C. §1961(3).

The Seventh Circuit, however, effectively held that a corporate subsidiary can *never* be a RICO person, thus altering the plain language of the statute and adding a new barrier for civil RICO plaintiffs. The Seventh Circuit based its reasoning on the notion that, on some generalized level, corporate subsidiaries serve the same purposes as corporate divisions. The Seventh Circuit postulated that a corporation can choose to conduct its activities in two manners: it can either create its own divisions to carry out corporate tasks, or it can form subsidiaries that serve the same function as divisions but constitute separate entities. The Seventh Circuit reasoned that because corporations can carry out the same tasks in either manner, a corporate subsidiary that engages in a pattern of racketeering activity *cannot be a RICO person* because a similarly-situated corporate *division*, carrying out the same activities, would not constitute a RICO person. The Seventh Circuit stated:

> There is no allegation that by using subsidiaries rather than divisions the AGF group somehow made it easier to commit or conceal the fraud of which the plaintiff complains.

App. 6. The Seventh Circuit thus attempts to limit the contours of the RICO statute by constructing an artificial barrier that was not contemplated by Congress and is not found anywhere in the text of the statute.

When a corporation creates a subsidiary corporation, it creates a new legal entity distinct and separate from itself. Corporations gain many benefits by operating through subsidiaries rather than divisions. However, liabilities exist alongside the benefits.

There is nothing in the text of RICO to support the Seventh Circuit's decision that corporate subsidiaries cannot be RICO persons—such a result cannot be reconciled with the plain language of the RICO statute. When Congress has spoken clearly, the plain language of the statute prevails. *Salinas v. United States*, ___ U.S. ___, 1997 U.S. LEXIS 7332, *10 (1997) ("courts may deviate from the plain language of a statute only in 'rare and exceptional circumstances'"); *Hubbard v. United States*, 514 U.S. 695, 708 (1995) (courts should give effect to "plain language of an Act of Congress, particularly when the Legislature has specifically defined the controverted term").

The Seventh Circuit seeks to justify its artificial restriction by reasoning that a RICO plaintiff who learns that a corporate subsidiary is engaging in fraud can simply name the individual defendants (i.e., "corporate officers or employees") who are responsible for the fraud.[1] App. 6-7.

---

[1] In fact, Ms. Emery brought Count III of the Second Amended Complaint against individual defendants (the John Does), who were identified as the individual officers or employees responsi-

(continued...)

The Seventh Circuit's concession is, however, inadequate. There are important reasons, like forfeiture of corporate assets, why a plaintiff (or the government) might want to name a corporate subsidiary as a defendant rather than merely naming the particular corporate officer who devised and implemented the scheme.

There is no statutory support for the Seventh Circuit's unprecedented limitation on a subsidiary being named a RICO person. Because the Seventh Circuit sidestepped the plain language of RICO by imposing its own restriction on RICO pleading, Ms. Emery respectfully requests that this Court grant certiorari and reverse the Seventh Circuit's decision.

B. The Seventh Circuit's decision conflicts with decisions of other circuits and with a previous decision of the Seventh Circuit itself.

In a previous decision that was affirmed by this Court, the Seventh Circuit explicitly held that wholly-owned corporate subsidiaries themselves can be RICO persons. *Haroco, Inc. v. American National Bank and Trust Co. of Chicago*, 747 F.2d 384 (7th Cir. 1984), *aff'd*, *American National Bank & Trust Co. v. Haroco*, 473 U.S. 606 (1985).

(...continued)
ble for devising the policies at issue in this case. See III(a), III(b) and III(c) from the chart above. Count III would seem to comply with the Seventh Circuit's explicit requirements, yet the Seventh Circuit affirmed dismissal of this count.

There is no distinction, analytically, between a claim in which an individual employee who is given authority over part of a company's affairs is named the RICO person and a claim in which an entire subsidiary given similar authority is named the RICO person. In its decision in this case, the Seventh Circuit therefore tossed aside the reasoning of eight other courts of appeal when it held that corporate subsidiaries are not proper RICO persons. *See, e.g., Miranda v. Ponce Federal Bank*, 948 F.2d 41 (1st Cir. 1991); *Jaguar Cars, Inc. v. Royal Oaks Motor Car Co.*, 46 F.3d 258 (3d Cir. 1995); *Landry v. Air Line Pilots Association Int'l*, 901 F.2d 404 (5th Cir. 1990); *Davis v. Mutual Life Insurance Co. of New York*, 6 F.3d 367 (6th Cir. 1993); *United Healthcare Inc. v. American Trade Ins.*, 88 F.3d 563 (8th Cir. 1996); *Sever v. Alaska Pulp Corp.*, 978 F.2d 1529 (9th Cir. 1992); *Yellow Bus Lines, Inc. v. Drivers, Chauffeurs and Helpers Local Union 639*, 913 F.2d 948 (D.C. Cir. 1990).

In these cases, the circuit courts held that individual members of corporate groups can constitute RICO persons. In many other cases, circuit courts have found that the imposition of liability on such a party—an individual or a corporation—is consistent with the purpose of RICO—to proscribe the conduct of those who exploit authority and resources conferred by being part of an enterprise. *United States v. Robinson*, 8 F.3d 398 (7th Cir. 1993); *Gagan v. American Cablevision, Inc.*, 77 F.3d 951 (7th Cir. 1996); *Ashland Oil, Inc. v. Arnett*, 875 F.2d 1271 (7th Cir. 1989); *United States v. Horak*, 833 F.2d 1235 (7th Cir. 1987); *Napoli v. United States*, 32 F.3d 31 (2d Cir. 1994); *United States v. Oreto*, 37 F.3d 739 (1st Cir. 1994); *Libertad v. Welch*, 53 F.3d 428 (1st Cir. 1995); *United States v. London*, 66 F.3d 1227 (1st Cir. 1995).

When the Seventh Circuit's opinion in this case is read together with its opinion in *Fitzgerald v. Chrysler*, 116 F.3d 225 (7th Cir. 1997), it is clear that plaintiffs in the Seventh Circuit can no longer plead *any* RICO claim based on a person/enterprise combination within a corporate family. The Seventh Circuit in *Fitzgerald* held that a RICO claim based on the parent as person and the subsidiaries as enterprise is not viable; in this case, the Seventh Circuit found the *opposite* configuration invalid.

As such, the Seventh Circuit has broken with the clear trend of RICO case law. Circuit after circuit has held that when one member of a corporate group is assigned the task of administering some line of business engaged in by the corporate group, that member is in a position equivalent to that of a manager of a corporation who uses his position to engage in a pattern of fraud.

As this Court stated in *Sedima v. Imrex Co.*, 473 U.S. 479, 499 (1985),

> [RICO] has become a tool . . . against respected and legitimate enterprises. Yet Congress wanted to reach both legitimate and illegitimate enterprises. The former enjoy neither an inherent incapacity for criminal activity nor immunity from its consequences. The fact that [RICO] is used against respected businesses allegedly engaged in a pattern of specifically identified criminal conduct is hardly a sufficient reason for assuming that the provision is being misconstrued . . . . The fact that RICO has been applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth . . . . [T]his defect—if defect it is—is inherent in the statute as written, and its correction must lie with Congress.

In sum, there is no support in the statute or the case law for the Seventh Circuit's holding that one company within a corporate group that is delegated authority to conduct part of the group's business and does so through a pattern of racketeering activity cannot constitute a RICO person. The plain language of the statute and the reasoning of eight courts of appeal (and previous decisions of the Seventh Circuit itself) stand consolidated against this proposition.

II.

THE SEVENTH CIRCUIT IMPROPERLY DISMISSED THE RICO CLAIM AGAINST THE INDIVIDUAL DEFENDANTS.

In this case, the plaintiff was not permitted to conduct discovery before responding to the defendants' motions to dismiss. As a consequence, she did not know which individuals devised the fraudulent activity on behalf of the corporate subsidiary. In its discussion of Fed.R.Civ.P. 9(b)'s pleading requirements, the Seventh Circuit acknowledged that a plaintiff could be placed in a "Catch-22 situation" in which she was barred from seeking the very information essential to adequately pleading a RICO violation. App. 4. However, the Seventh Circuit failed to apply this insight to its consideration of the RICO person/enterprise pleading requirements, stating that

> the individual defendants are not alleged to control the corporation alleged to have committed the frauds that constitute the RICO violation, or a corporate division or other identifiable branch or unit that they somehow carved out from the legitimate corporate hierarchy and made their

> own little bailiwick. They are alleged merely to have devised the fraud . . . . so that if "devisers" are RICO violators there would be a RICO violation whenever a corporation engaged in a pattern of racketeering activity—and thus automatically—even though the statute makes the conduct of or participation in the corporation's affairs a separate element of liability.

App. 8. The Seventh Circuit appears, then, to have based its dismissal of the "John Does" claim in part upon the notion that individual RICO defendants must be in positions of corporate control. Such a holding conflicts directly with the Third Circuit's decision in *United States v. Oreto*, 37 F.3d 739, 750 (1st Cir. 1994) ("one may 'take part in' the conduct of an enterprise by knowingly implementing decisions, as well as by making them").

III.

THE SEVENTH CIRCUIT IMPROPERLY HELD THAT ALLEGATIONS OF MAIL FRAUD BASED ON DEFENDANTS' TRANSMITTAL OF NUMEROUS COPIES OF THE SAME FORM DOCUMENT DID NOT CONSTITUTE A PATTERN OF RACKETEERING.

Ms. Emery's RICO claims are premised on allegations of mail fraud, which must be pled with particularity under Fed.R.Civ.P. 9(b). The document she received was a form letter that was sent to many other low-income consumers. The Seventh Circuit held that the letter was sufficiently misleading to constitute a violation of the mail fraud statute. App. 2. However, the Seventh Circuit improperly held that Ms. Emery failed to allege a pattern of racketeering activity because she *could not identify* others who received the same letter by name and, therefore, failed to plead other instances of fraud with particularity.

The Seventh Circuit acknowledged that Ms. Emery was precluded from taking any discovery concerning these matters. The Seventh Circuit also acknowledged that Fed.R.Civ.P. 9(b) is "satisfied by a showing that further particulars of the alleged fraud could not have been obtained without discovery." App. 4. *Accord*, *New England Data Serv., Inc. v. Becher*, 829 F.2d 286 (1st Cir. 1987); *Michaels Building Company v. Ameritrust Company, N.A.*, 848 F.2d 674 (6th Cir. 1988); *Schiffels v. Kemper Fin. Serv., Inc.*, 978 F.2d 344 (7th Cir. 1992).

Nevertheless, the Seventh Circuit refused to reverse the District Court's dismissal of the complaint, stating that Ms. Emery "didn't explore the possibility of obtaining from the defendants or other sources, without discovery, the identity of other recipients of the form letter . . . ." App. 4. There is no such requirement that plaintiffs obtain information from "other sources," whatever that phrase means.

Ms. Emery established that the form document she received constituted mail fraud. Because the identities of other recipients were completely within the purview of the defendants, she satisfied the pleading requirements of Fed.R.Civ.P. 9(b). The Seventh Circuit thus imposed an improper pleading requirement under Fed.R.Civ.P. 9(b) when it determined that she failed to allege a pattern of racketeering.

CONCLUSION

For all the reasons stated above, petitioner Verna Emery respectfully requests that the Court issue a writ of certiorari to the United States Court of Appeals for the Seventh Circuit and reverse the opinion of the Seventh Circuit affirming dismissal petitioner's complaint.

Respectfully submitted,

DANIEL A. EDELMAN
Counsel of Record
CATHLEEN M. COMBS
JAMES O. LATTURNER
TARA L. GOODWIN
JAMIE S. FRANKLIN
EDELMAN & COMBS
135 South LaSalle Street
Suite 2040
Chicago, IL 60603
(312) 739-4200
Attorneys for Petitioner

Dated: May 26, 1998

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 97-1546

VERNA EMERY, on behalf of herself and all others similarly situated,

Plaintiff-Appellant,

v.

AMERICAN GENERAL FINANCE, INC., AMERICAN GENERAL FINANCE CORPORATION, and JOHN DOES 1-10,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 94 C 5181—**Robert W. Gettleman**, *Judge.*

ARGUED DECEMBER 9, 1997—DECIDED JANUARY 28, 1998

Before POSNER, *Chief Judge*, and BAUER and COFFEY, *Circuit Judges.*

POSNER, *Chief Judge.* This is the second coming of a case that we remanded to the district court, 71 F.3d 1343 (7th Cir. 1995), which had granted a motion to dismiss the case, a class action suit under RICO, 18 U.S.C. §§ 1961 *et seq.*, for failure to state a claim, on the ground that the only predicate act alleged, a mail fraud, was not fraudulent. The alleged fraud was "loan flipping," in which a lender offers to refinance the borrower's existing loan on advantageous terms, concealing the fact that the terms are in fact highly

disadvantageous. We held that the letter that a subsidiary of one of the corporate defendants (we'll refer to the corporate defendants in the aggregate as AGF) mailed to the named plaintiff, Emery, was sufficiently misleading to make out, in conjunction with the allegations of the complaint, a violation of the mail fraud statute. And so we reversed. But we noted that the RICO statute requires that a plaintiff prove at least two separate criminal acts, and that the complaint in this case, while alleging that the defendants had perpetrated the same fraud on other customers, gave no particulars, and so fell afoul of Fed. R. Civ. P. 9(b). But we thought that the suit should not be dismissed without giving the plaintiff a chance to replead, and on remand the district judge did this. The plaintiff filed a first amended complaint, which the judge again dismissed, and a second amended complaint, which he also dismissed, and this time he dismissed the suit and the plaintiff has appealed.

The judge ruled that the second amended complaint still failed to comply with Rule 9(b) and also failed to allege the conduct of an enterprise's activity through a pattern of racketeering, 18 U.S.C. § 1962(c), consisting of mail fraud. We think both grounds for the dismissal of the suit are correct, and while it is possible that the deficiencies of the complaint could be cured by further pleading, the plaintiff has had three chances over the course of three years to state a claim and the district judge was not required to give her another chance. *General Electric Capital Corp. v. Lease Resolution Corp.*, 128 F.3d 1074, 1085 (7th Cir. 1997); *Word of Faith World Outreach Center Church, Inc. v. Sawyer*, 90 F.3d 118, 124 (5th Cir. 1996).

The second amended complaint names three more "victims." Unfortunately, the plaintiff's lawyer has not been able to find the letters that AGF sent to two of them and as to the third, the only solicitation the lawyer has come up with is an innocuous couple of sentences in the monthly loan statement that AGF sent this "victim"; moreover, as the statement carries the same date as the refinancing, it

could not have caused this "victim" any harm. All we know about the other two victims is that they were borrowers from AGF who refinanced their loans on disadvantageous terms at some unknown time after receiving letters "substantially similar" to the one that the named plaintiff received. The letters, mailed more than a year after the letter to Emery that kicked off this suit (indeed mailed after the suit was commenced), could be "substantially similar" yet not misleading or actionable, especially as there is no allegation that the recipients were unsophisticated, a factor emphasized in our previous opinion.

We are mindful of the difficulty that a plaintiff's lawyer can encounter in trying to gather enough evidence of multiple frauds in advance of filing suit to satisfy the requirements of Rule 9(b), especially in a RICO fraud case, where the plaintiff needs to allege more than one fraud, and thus satisfy Rule 9(b) as it were twice. The two additional victims received their solicitation letters years ago and obviously didn't keep them; and it is apparent that neither do they remember the contents of the letters with any specificity. No doubt other customers of AGF received the same or materially the same letter as Emery; but whether they were deceived is another matter, and one on which the complaint sheds no light. If when this suit was filed in 1994 the plaintiff's lawyer had appreciated the need to plead two mail frauds with the particularity required by Rule 9(b), as she should have, she could have scouted around and found other recipients of the form letter. Having waited three years, she may have put herself in a position where it simply was too late to satisfy the conjoint requirements of RICO and 9(b). In any event, the allegations regarding the two additional victims, lacking as they do any identification of the allegedly fraudulent instruments, do not satisfy the requirements of Rule 9(b). *Jepson, Inc. v. Makita Corp.*, 34 F.3d 1321, 1328-29 (7th Cir. 1994); *Graue Mill Development Corp. v. Colonial Bank & Trust Co.*,

927 F.2d 988, 992-93 (7th Cir. 1991); *Ahmed v. Rosenblatt*, 118 F.3d 886, 889 (1st Cir. 1997).

We don't want to create a Catch-22 situation in which a complaint is dismissed because of the plaintiff's inability to obtain essential information without pretrial discovery (normally of the defendant, because the essential information is in his possession and he will not reveal it voluntarily) that she could not conduct before filing the complaint. But Rule 9(b) is relaxed upon a showing of such inability. *Katz v. Household Int'l, Inc.*, 91 F.3d 1036, 1040 (7th Cir. 1996); *In re Burlington Coat Factory Securities Litigation*, 114 F.3d 1410, 1418 (3d Cir. 1997); *Kowal v. MCI Communications Corp.*, 16 F.3d 1271, 1279 n. 3 (D.C. Cir. 1994); *Devaney v. Chester*, 813 F.2d 566, 569 (2d Cir. 1987). In fact the plaintiff in this case attempted to conduct discovery after she filed her initial complaint, and discovery was stayed upon the defendants' motion. Rule 9(b) is satisfied by a showing that further particulars of the alleged fraud could not have been obtained without discovery. The plaintiff did not make that showing. Her lawyer admits that she didn't explore the possibility of obtaining from the defendants or other sources, without discovery, the identity of other recipients of the form letter that her client received, and as we said her failure at the outset to appreciate the requirements of Rule 9(b) may in conjunction with the passage of time have doomed any efforts to find a second victim of the fraud.

Several months ago we decided *Fitzgerald v. Chrysler Corp.*, 116 F.3d 225 (7th Cir. 1997), another RICO case brought by the law firm that represents the plaintiff in this case. The misunderstanding of RICO that defeated the firm there persists in the present appeal. The plaintiff's lawyer continues despite *Fitzgerald* to believe that the requirement in a case such as this of proof that defendants conducted the affairs of an enterprise through a pattern of racketeering activity, 18 U.S.C. § 1962(c), is satisfied merely by showing that the pattern of predicate acts (the mail frauds,

in this case) were committed by a firm that has agents or affiliates. That is not enough. The firm must be shown to use its agents or affiliates in a way that bears at least a family resemblance to the paradigmatic RICO case in which a criminal obtains control of a legitimate (or legitimate-appearing) firm and uses the firm as the instrument of his criminality.

The second amended complaint alleges that American General Corporation is a holding company and its wholly owned subsidiary, American General Finance Corporation (AGFC), is engaged in the consumer lending business. AGFC in turn is the sole owner of defendant American General Finance, Inc. (AGFI), an Illinois corporation that conducts AGFC's business in Illinois. It was the manager of one of AGFI's branch offices who wrote the misleading letter to Emery. The individual defendants, John Does 1 through 10, are alleged to be "the individuals responsible for devising the policies used [by] each" of the defendants. The holding company is alleged to have delegated responsibility for the preparation and approval of solicitations to AGFC, which "devised the [fraudulent] scheme and directed its subsidiaries [presumably including AGFI] to implement it." The RICO enterprise, variously described, is essentially the corporate group; and AGFC and the Does are alleged to have conducted the affairs of the enterprise through a pattern of mail fraud.

Begin with AGFC. Its alleged act of devising a fraudulent solicitation that AGFI, its Illinois subsidiary (and perhaps its other subsidiaries in other states), distributed cannot be regarded as conducting the business of the AGF group through a pattern of fraud. Whether AGFC operated through divisions, which would make the branch manager of AGFI who mailed the misleading letter to Emery an employee of AGFC and would therefore preclude a finding of a RICO enterprise on anyone's view, *Fitzgerald v. Chrysler Corp., supra*, 116 F.3d at 226; *Discon, Inc. v. NYNEX Corp.*, 93 F.3d 1055, 1063 (2d Cir. 1996), or through wholly owned

subsidiaries is a difference unrelated to any goal or policy of RICO. *Id.* at 1064; *Fitzgerald v. Chrysler Corp., supra,* 116 F.3d at 227; *Compagnie de Reassurance d'Ile de France v. New England Reinsurance Corp.,* 57 F.3d 56, 92 (1st Cir. 1995). The parent would be exercising power that is inherent in its ownership of wholly owned subsidiaries. There is no allegation that by using subsidiaries rather than divisions the AGF group somehow made it easier to commit or conceal the fraud of which the plaintiff complains.

It would be different if as in *Haroco, Inc. v. American National Bank & Trust Co.,* 747 F.2d 384 (7th Cir. 1984), aff'd on other grounds, 473 U.S. 606 (1985), criminals took over a corporate subsidiary which then managed to wrest control of the parent and use the parent as an instrument for further criminal activities. That would be a case of magnifying the powers of the criminal by seizing control of a legitimate organization. Which brings us to John Does 1 through 10. The Third Circuit, relying in part on our decision in *McCullough v. Suter,* 757 F.2d 142, 144 (7th Cir. 1985), has held that an allegation that corporate officers or employees are using their corporation to perpetrate the frauds or other predicate acts satisfies the "conduct the affairs through" requirement. *Jaguar Cars, Inc. v. Royal Oaks Motor Car Co.,* 46 F.3d 258, 267-69 (3d Cir. 1995). However, it is one thing to allege that criminals are using a corporation to commit crimes, a natural meaning to impress on the statutory language of conducting an enterprise's affairs through a pattern of racketeering activity, and another to assert merely that since the corporation's unlawful scheme must have been hatched by someone connected to the corporation, the scheme (provided it satisfies the statute's pattern requirement) violates RICO. Corporations can act only through natural persons, so the approach that we are criticizing (and that we do not attribute to the Third Circuit, since *Jaguar Cars* was a case in which the defendants controlled the corporation, see 46 F.3d at 261) would eliminate any separate function for the "conducts the

affairs of through" language of the statute if the perpetrator is a firm. If the scheme is actually hatched or directed by the board of directors or some other controlling group, whether the control is de facto or de jure, it will come close enough to the paradigmatic RICO case to pass muster under the "family resemblance" test that we applied in the *Fitzgerald* case. That is the teaching of *Jaguar Cars* but is not alleged here. The plaintiffs' inability to identify any actual corporate officers or employees as responsible parties shows that she is trying to truncate the statute in the manner that strikes us as inadmissible.

We are mindful of the cases that hold or imply that the RICO defendant need not be an owner or even a member of top management in order to be guilty of conducting the affairs of an enterprise through a pattern of racketeering activity, and even more clearly to be guilty of *participating* in such conducting, which is also a violation. *Reves v. Ernst & Young*, 507 U.S. 170 (1993); *MCM Partners, Inc. v. Andrews-Bartlett & Associates, Inc.*, 62 F.3d 967, 977-79 (7th Cir. 1995); *United States v. Oreto*, 37 F.3d 739, 750-51 (1st Cir. 1994). But those cases are different. In *Reves* the issue was how much involvement in a corporation's affairs a corporate *outsider* (an accounting firm, in that case) had to have in order to be deemed a participant in the conduct of those affairs. In *MCM* and *Oreto* the "enterprise" was not a corporation or other normal firm but an "association in fact," which is a polite name for a criminal gang or ring. None of the cases adopts the position for which the plaintiff here is contending—that if a corporation engages in a pattern of racketeering activity, RICO liability falls on whoever in the corporation committed the acts constituting the illegal activity. That position would treat the corporation as an enterprise distinct from its employees, which the cases that we cited earlier forbid.

What *is* distinct from the corporation is the people who control it, or perhaps control even just a part of it, for we often speak of a "control group" as something different

from the corporation controlled; and there is no contradiction or even strain in talking about the "owner" of a "corporation" as separate entities. And so the result in *Jaguar Cars* was correct. But in this case the individual defendants are not alleged to control the corporation alleged to have committed the frauds that constitute the RICO violation, or a corporate division or other identifiable branch or unit that they somehow carved out from the legitimate corporate hierarchy and made their own little bailiwick. They are alleged merely to have devised the fraud—they might, for all that appears, be marketing personnel whose job is to think up, but not direct or implement, clever ideas for getting more loans. There can be no corporate fraud without a deviser, that is, without a human inventor, so that if "devisers" are RICO violators there would be a RICO violation whenever a corporation engaged in a pattern of racketeering activity—and thus automatically—even though the statute makes the conduct of or participation in the corporation's affairs a separate element of liability.

AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, IL 60604

February 24, 1998

Before

Hon. Richard A. Posner, Chief Judge
Hon. William J. Bauer, Circuit Judge
Hon. John L. Coffey, Circuit Judge

VERNA EMERY, on behalf of herself and all others similarly situated, *Plaintiff-Appellant,*	)	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 97-1546 v.	)	
AMERICAN GENERAL FINANCE, INC., AMERICAN GENERAL FINANCE CORPORATION, and JOHN DOES 1-10, *Defendants-Appellees.*	)	No. 94 C 5181 Robert W. Gettleman, *Judge.*

ORDER

On February 11, 1998, plaintiff-appellant filed a petition for rehearing with a suggestion for rehearing en banc. All the judges on the original panel have voted to deny the petition, and none of the active judges has requested a vote on the suggestion for rehearing en banc. The petition is therefore DENIED.

Hon. Walter J. Cummings did not participate in the consideration of the petition.

App. 10

[Dated February 18, 1997]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

VERNA EMERY, on behalf of herself and all others similarly situated, Plaintiff,	)	No. 94 C 5181
v.	)	
	)	Judge
AMERICAN GENERAL FINANCE, INC. AMERICAN GENERAL FINANCE CORP. and JOHN DOES 1-10, Defendants.	)	Robert W. Gettleman

MEMORANDUM OPINION AND ORDER

Plaintiff Verna Emery has brought a four count putative class action second amended complaint against defendants American General Finance, Inc. ("AGFI"), American General Finance Corp. ("AGFC") and John Does Nos. 1-10, complaining of certain practices (denominated by plaintiff as "loan flipping") concerning defendants' solicitation of loans from existing customers. Count I alleges a violation of the Racketeer Influence Corrupt and Corrupt Organization Act (RICO), 18 U.S.C. § 1961, *et seq.*, against AGFC; Count II alleges a RICO violation against AGFI; Count III alleges RICO violations against John Does Nos. 1-10; and Count IV alleges that AGFI and AGFC violated the consumer fraud statutes of "some or all" of the fifty states and the District of Columbia. Defendants' have moved to dismiss all counts for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6). For the

reasons set forth below, defendants' motion is granted, and this suit is dismissed with prejudice.

BACKGROUND

Plaintiff originally brought this action as a one count RICO complaint against AGFI. This court dismissed that suit, concluding that absent a duty to disclose, AGFI could not be found liable for mail fraud. *Emery v. American General Finance, Inc.*, 873 F. Supp. 1116 (N.D. Ill. 1995). The Seventh Circuit reversed, holding that the complaint adequately alleged an intentional half-truth. *Emery v. AGFI*, 71 F.3d 1343, 1348 (7th Cir. 1995). The court also held, however, that the complaint failed to plead a pattern of racketeering activity because it pleaded only one incident of mail fraud particularly, and then alleged that defendant did the same thing to others.

On remand, plaintiff filed an amended complaint, wholly restructuring her lawsuit. The amended complaint named AGFC as the RICO defendant and, seeking to cure the lack of specific allegations of a pattern of racketeering activities, added additional allegations of two other AGFI customers.

On August 28, 1996, this court dismissed plaintiff's amended complaint with prejudice because it failed to allege a RICO enterprise separate and distinct from the RICO person, improperly sought to impose *respondeat superior* liability, and failed to allege a pattern of racketeering activity. *Emery v. AGFI*, 938 F. Supp. 495 (N.D. Ill. 1996). With respect to racketeering activity, this court held that the amended complaint failed to allege that either of the two AGFI customers added to cure the pat-

tern deficiencies in the original complaint ever received a misleading solicitation through the mail, or even made their loan payments through the mail. Therefore, the amended complaint failed to allege more than one instance of mail fraud and failed to allege a pattern of racketeering activity. *Id.*

Plaintiff sought leave to file a second amended complaint, asserting that she could cure all deficiencies noted by this court when it dismissed the amended complaint. Based on plaintiff's counsel's assurances, the court granted plaintiff leave to file a second amended complaint. The second amended complaint once again restructures the lawsuit. It now names both AGFI and AGFC as RICO defendants as well as ten John Doe defendants. It attempts to cure the enterprise allegation deficiencies by eliminating certain factual allegations on which this court relied in determining that plaintiff had failed to allege an enterprise separate and distinct from the RICO defendant. With respect to racketeering activity, plaintiff has alleged, albeit on information and belief, that the additional customers received a solicitation similar to the one plaintiff received, and in response to that solicitation went to AGFI for another loan. Plaintiff has also added an allegation about another customer who received a different solicitation with her monthly statement.

Not surprisingly, the second amended complaint was met with another motion to dismiss, asserting that plaintiff has failed to correct any of the earlier deficiencies. This court agrees.

DISCUSSION[1]

Defendants once again assert that the second amended complaint fails to: (1) satisfy RICO's requirement that the RICO enterprise be separate and distinct from the RICO person; (2) plead a pattern of racketeering activities; (3) plead fraud with particularity, and (4) allege causation. Because the court agrees that the second amended complaint fails to plead adequately a pattern of racketeering activity, and fails to plead fraud with particularity, defendants' motion to dismiss is granted.

As held by the Seventh Circuit in this case, to prevail on her RICO counts, plaintiff must plead and prove a pattern of racketeering activity consisting of at least two criminal acts. Where, as here, the acts alleged are fraud, the circumstances of each act must be pleaded with particularity as required by Fed. R. Civ. P. 9(b). *Emery*, 71 F.3d at 1348. As stated earlier, to comply with this directive, in her amended complaint plaintiff added allegations relating to two other customers, Tawanna Gill and Tonia Carr. The amended complaint failed to allege, however, that either Ms. Gill or Ms. Carr received a misleading solicitation through the mail, or that either made loan payments through the mail. Accordingly, this court concluded that the amended complaint failed to allege mail fraud with respect to Ms. Gill or Ms. Carr, leaving plaintiff's amended complaint with the exact deficiencies identified by the Seventh Circuit.

---

[1] A complete statement of the facts alleged in this case and a copy of the flyer sent to plaintiff can be found in this court's original opinion, *Emery*, 873 F. Supp. 1116, and the Seventh Circuit opinion, 71 F.3d 1343.

To address this problem, plaintiff has made two additions to her second amended complaint. With respect to Gill and Carr, plaintiff has alleged "on information and belief" that each received a solicitation substantially similar to the one received by plaintiff. As in her first amended complaint, however, she has not that either Gill or Carr received any such solicitation through the mail, or that either made loan payments through the mail. Without a use of the mail, the allegations cannot support a claim or mail fraud. *Associates in Adolescent Psychiatry, S.C. v. Home life Ins. Co.*, 751 F. Supp. 727 (N.D. Ill. 1990, aff'd 941 F.2d 561 (7th Cir. 1991). Additionally, the allegations with respect to Carr and Gill are insufficient under Rule 9(b), which requires fraud to be pleaded with particularity. Allegations upon information and belief, such as plaintiff has alleged here, are insufficient to allege fraud under Rule 9(b), even if the facts are inaccessible to the plaintiff, unless the plaintiff states the grounds for her suspicions. *Uni*Quality, Inc. v. Infotronx, Inc.*, 974 F.2d 918, 923 (7th Cir. 1992). Here, plaintiff has not suggested that the facts concerning the nature of the solicitation or the use of the mails in sending the solicitation or making payments are not accessible to her, nor has she stated the grounds for her suspicion that the mails were used. As noted in *Uni*Quality*, 974 F.2d at 923:

> "Rule 9(b)'s particularity requirement serves an important purpose. Accusations of fraud can seriously harm a business. This is especially so in RICO cases where those accusations of fraud lead to the probably more damaging accusation that the business engaged in 'racketeering.' Rule 9(b) insures that a plaintiff have some basis for his accusations of fraud before

> making those accusations and thus discourages people from including such accusations in complaints simply to gain leverage for settlement or for other ulterior purposes."

Here, plaintiff has alleged on information and belief that Gill and Carr received a solicitation substantially similar to the allegedly misleading solicitation received by plaintiff. Thus, all plaintiff has done is state that she suspects Carr and Gill received something misleading, without identifying what that something is. This hardly complies with the purpose of Rule 9(b), and certainly is insufficient to allege a pattern of racketeering activity.

Plaintiff has also added an allegation that a customer named Bessie Chalmers, again "on information and belief," responded to a solicitation in her monthly statement which provided:

> "YOU'RE INVITED TO BLUE RIBBON DAYS IN APRIL. PLEASE STOP BY AND SEE US. WE'RE SHOWING OUR APPRECIATION FOR ALL OF OUR BLUE RIBBON CUSTOMERS THROUGHOUT APRIL WITH SPECIAL EVENTS AND BLUE RIBBON SERVICE. CALL US TODAY AT (312) 581-0250 AND WE COULD HAVE YOUR LOAN APPROVED IN LESS THAN AN HOUR."

Plaintiff alleges that the logical inference from this notice is that Chalmers and others would receive additional money by an additional loan or an addition to the existing loan, not by "flipping" the current loan.

Plaintiff does not allege that this notice is deceptive or misleading in any way (unlike the solicitation letter she received which she does allege to be both misleading and deceptive). Nor does she allege that defendant was not

holding a special event, or that the purpose of the notice was simply to "rip her off." Emery, 71 F.3d at 1347. Nor does the complaint allege that Ms. Chalmers is a financially naive working class borrower who does not read truth-in-lending forms intelligently, or that defendant knew this and targeted her as such. Id. Indeed, the complaint does not allege, or even suggest, that such notice was not sent out on every monthly statement, regardless of the competency of the recipient. Thus, it is unlikely that the mailing to Ms. Chalmers could support a claim for mail fraud even under the broad view of the majority in *Emery*.

There are other, equally serious problems with plaintiff's reliance on the "solicitation" contained in Chalmer's monthly statement to support plaintiff's allegations of a "pattern of racketeering activity." The complaint alleges, again "on information and belief," that Chalmers responded to the solicitation in her monthly statement which was attached to the complaint as an exhibit. The exhibit, however, is dated March 29, 1995. The new "loan" that Chalmers allegedly obtained in response to the exhibit is also dated March 29, 1995. Indeed, the monthly statement that contained the solicitation also contains a summary of the new loan. Thus, as defendants correctly argue, the alleged solicitation was mailed after Chalmers entered the new loan, and could not have influenced Chalmers's decision to obtain that loan.

In response to this argument, plaintiff disingenuously asserts that she is "not contending that Ms. Chalmers responded to the precise solicitation attached to the second amended complaint"; rather, plaintiff has "alleged that Ms. Chalmers received multiple monthly statements con-

taining the fraudulent solicitation and, that in response to the monthly solicitations she obtained the new loan." This statement is simply not true, and borders on a violation of Fed. R. Civ. P. 11. The complaint clearly alleges only one solicitation, and states on information and belief that Chalmers responded to the solicitation attached to the complaint. To the extent that exhibits contradict allegations in the complaint, the exhibits control. *In re first Chicago Corp. Sec. Lit.*, 769 F. Supp. 1444, 1450 (N.D. Ill. 1991). Accordingly, the court concludes that the second amended complaint fails to plead adequately a pattern of racketeering activity. Counts I through III are therefore dismissed.

Finally, defendants have also argued that the second amended complaint again fails to allege a RICO enterprise separate and distinct from the RICO person. In *Moore v. Fidelity Financial Services, Inc.*, 949 F. Supp. 673, 1997 WL 14712 (N.D. Ill. 1997), this court addressed the issue of whether a Section 1962(c) claim can be stated when the RICO persons and enterprises are comprised of interrelated corporate units. The court concluded that in such situations the plaintiff must allege that the RICO person was doing something more than merely conducting its own corporate affairs. Under this court's reasoning in Moore, it concludes that in the instant case plaintiff has failed to allege anything more than individual corporations carrying out their own corporate affairs. Accordingly, the complaint fails to allege RICO enterprises separate and distinct from the RICO persons.

CONCLUSION

For the reasons set forth above, the court concludes that the second amended complaint fails to plead adequately a pattern of racketeering activity and fails to allege a RICO enterprise separate and distinct from the RICO person. Accordingly, Counts I through III are dismissed with prejudice. Because those counts are the only basis for federal jurisdiction, the court dismisses Count IV pursuant to 28 U.S.C. § 1367.

ENTER: February 18, 1997

/s/ Robert W. Gettleman
Robert W. Gettleman
United States District Judge

[Dated September 13, 1996]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

VERNA EMERY, on behalf of herself and all others similarly situated, Plaintiff,	)	
v.	)	No. 94 C 5181
AMERICAN GENERAL FINANCE, INC., AMERICAN GENERAL FINANCE CORPORATION, and JOHN DOES 1-10, Defendants.	)	

SECOND AMENDED COMPLAINT – CLASS ACTION

MATTERS COMMON TO MULTIPLE COUNTS

INTRODUCTION

1. This class action seeks redress for the practices of defendants American General Finance, Inc. and American General Finance Corporation of "flipping," or inducing the refinancing, of loans through deception and concealment. The complaint alleges that this practice violates the federal RICO statute, 18 U.S.C. §1961 (Count I-III) and that the defendants violated various state laws prohibiting unfair and deceptive acts and practices (Count IV).

JURISDICTION

2. This Court has jurisdiction under 18 U.S.C. §1964 and 28 U.S.C. §§ 1331, 1367. Venue in this District is proper because the defendants do business here.

PARTIES

3. Verna Emery is an individual who resides at 1165 N. Milwaukee, #2511, Chicago, Illinois 60622.

4. Defendant, American General Finance, Inc. ("AGFI") is an Illinois corporation which maintains offices at 7746 N. Milwaukee Ave., Niles, Illinois 60714, and 200 W. Adams, #1203, Chicago, Illinois 60606. The registered agent and officer of AGFI is Clay A. Mosberg, 36 S. State Street, Suite 1804, Chicago, Illinois 60603-2607.

5. Defendant, American General Finance Corporation ("AGFC") is an Indiana corporation whose executive offices are located at 601 N.W. 2nd Street, Evansville, Indiana 47708.

6. AGFC is a financial services company which is engaged primarily in the consumer finance and credit insurance business.

7. AGFC, through its subsidiaries, has a branch office network of over 1,300 offices in 40 states, Puerto Rico, and the U.S. Virgin Islands. AGFC regularly does business in Cook County.

8. AGFC is the sole shareholder and parent company of AGFI. AGFI is an instrumentality of AGFC through which it carries out some of its business activities. AGFI regularly does business in Cook County.

9. AGFC is in turn 100% owned by a holding company American General Corporation ("AGC"). AGC and AGFC sell stock and debt securities to the public to finance the activities of AGFC and its subsidiaries. See, AGFC's 10K filing, attached hereto as Exhibit A.

10. AGFI, AGFC and AGC have different officers.

11. All revenue and profits of AGFC's subsidiaries including AGFI, inure to the benefit of AGC and AGFC, and were reported on the financial statements AGC and AGFC issued to the investing public and other financial institutions to borrow money and raise capital.

12. John Does 1-10 are the individuals responsible for devising the policies used each by AGC, AGFC, and AGFI and other subsidiaries.

EMERY'S JULY 14, 1992 TRANSACTION

13. On July 14, 1992, Emery signed a note with AGFI. The amount financed was $1983.81, the finance charge was $1327.08, and the annual percentage rate was 36%. The note was secured by miscellaneous personal property (a typewriter, an amplifier and speakers, a cassette recorder-player, and a television set). Of the amount financed, $51.03 represented the premium for credit life insurance, $120.82 represented the premium for credit disability insurance, $64.42 represented the premium for insurance on plaintiff's personal property, and $6 the premium for purported "non-filing insurance."

14. Exhibit B, attached, is a copy of the note. Exhibit C, attached, is a copy of the Truth in Lending statement. Exhibit D, attached, is a copy of the security agreement.

15. The note provided that in the event of prepayment or acceleration, finance charges would be credited using the "Rule of 78's." Refund of unearned premiums on the insurance policies would also be computed using the Rule of 78's.

SOLICITATION TO BORROW ADDITIONAL MONEY

16. Shortly before January 29, 1993, AGFI solicited Emery to borrow additional money from it by means of communications sent to her through the United States Mail.

17. Exhibit E, attached, is a standard form letter which AGFI sends to borrowers to solicit them to borrow more money.

18. Exhibit E is deceptive and misleading, in that:

a. It purports to be an offer for an additional loan.

b. It uses such terms as "We can lend you money" and "I have money to loan," and suggests that "we could write your check on the spot."

c. It does not disclose that the borrower will refinance his or her existing obligation.

d. It suggests that she would be treated more favorably than a new customer, when a refinancing would result in her being treated less favorably.

19. Emery responded to AGFI's solicitation.

20. Instead of simply making a new loan, AGFI presented Emery with papers for a refinancing of her existing loan with additional funds being advanced.

21. AGFI failed to disclose that it would be far more expensive for Emery to refinance than to simply obtain a new loan.

22. There was no legal prohibition against AGFI simply making a new loan.

23. Upon information and belief, AGFI sends such solicitations to hundreds of customers in each state in which it does business.

EMERY'S JANUARY 29, 1993 TRANSACTION

24. On January 29, 1993, Emery signed a new note with AGFI, with an amount financed of $2,399.83, a finance charge of $1,641.28, an annual percentage rate of 35.96%. The note was secured by miscellaneous personal property (a typewriter, an amplifier and speakers, a cassette recorder-player, and a television set). Of the amount financed, $61.75 represented the premium for credit life insurance, $146.20 represented the premium for credit disability insurance, $77.99 represented the premium for insurance on plaintiff's personal property, and $6 represented the premium for purported "non-filing insurance." Another $96.80 of the amount financed went to "CU for IN," which plaintiff cannot identify.

25. Exhibit F, attached, is a copy of the note. Exhibit G, attached, is a copy of the Truth in Lending statement. Exhibit H, attached, is a copy of the security agreement.

26. The note provided that in the event of prepayment or acceleration, finance charges would be credited using the "Rule of 78's." Refund of unearned premiums on the insurance policies would also be computed using the Rule of 78's.

DISADVANTAGE OF REFINANCING

27. Had AGFI simply made a second loan for the additional amount which Emery was solicited to borrow, it would have cost Emery over $800 less.

28. AGFI did not disclose to Emery, when she entered into the January 29, 1993 transaction, that it would be substantially cheaper for her to simply obtain a second loan instead of refinancing the first loan.

ADDITIONAL VICTIMS

TAWANNA GILL

29. Tawanna Gill ("Gill") is an individual who resides at 3915 Warren Apt. 3A, Bellwood, Illinois 60104.

30. On October 26, 1994, Gill signed a note with AGFI. The amount financed was $1,564.26, the finance charge was $936.03, and the annual percentage rate was 31.96%. The note was secured by miscellaneous personal property (TV, VCR and stereo). Of the amount financed, $38.22 represented the premium for credit life insurance, $90.51 represented the premium for credit disability insurance, $50.99 represented the premium for insurance on plaintiff's personal property, and $6 the premium for purported "non-filing insurance."

31. Exhibit I, attached, is a copy of the note. Exhibit J, attached, is a copy of the Truth in Lending statement. Exhibit K, attached, is a copy of the security agreement.

32. The note provided that in the event of prepayment or acceleration, finance charges would be credited using the "Rule of 78's." Refund of unearned premiums on the insurance policies would also be computed using the Rule of 78's.

33. On information and belief, Gill received a solicitation substantially similar to Exhibit E.

34. In response to the solicitation, Gill approached AGFI about taking out an additional loan. AGFI agreed to make Gill a new loan.

35. On November 21, 1994, Gill signed a new note with AGFI, with an amount financed of $1,604.12, a finance charge of $956.78, an annual percentage rate of 31.96%. The note was secured by miscellaneous personal property (TV, VCR and stereo). Of the amount financed, $39.19 represented the premium for credit life insurance, $92.80 represented the premium for credit disability insurance, and $50.99 represented the premium for insurance on plaintiff's personal property.

36. Exhibit L, attached, is a copy of the note. Exhibit M, attached, is a copy of the Truth in Lending statement. Exhibit N, attached, is a copy of the security agreement.

37. The note provided that in the event of prepayment or acceleration, finance charges would be credited using the "Rule of 78's." Refund of unearned premiums on the insurance policies would also be computed using the Rule of 78's.

38. AGFI led Gill to believe, and she did in fact believe, that Gill was entering into a new loan—not refinancing her existing loan.

39. On March 6, 1995, Gill signed a third note with AGFI, with an amount financed of $2,891.37, a finance charge of $1,65.08, an annual percentage rate of 30.98%. This note was secured by the same miscellaneous personal property that secured the first two notes. Of the amount financed, $69.75 represented the premium for credit life insurance, $165.13 represented the premium for credit disability insurance, and $94.78

represented the premium for insurance on plaintiff's personal property.

40. Exhibit O, attached, is a copy of the note. Exhibit P, attached, is a copy of the Truth in Lending statement. Exhibit Q, attached, is a copy of the security agreement.

41. The note provided that in the event of prepayment or acceleration, finance charges would be credited using the "Rule of 78's." Refund of unearned premiums on the insurance policies would also be computed using the Rule of 78's.

42. Had AGFI simply made a second and third loan for the additional amount which Gill was solicited to borrow, it would have cost Gill substantially less.

43. AGFI did not disclose to Gill, when she entered into the November 21, 1994 or March 6, 1995 transactions, that it would be substantially cheaper for her to simply obtain a second and third loan instead of refinancing the first two loans.

TONIA CARR

44. Tonia Carr ("Carr") is an individual who lives at 8017 S. Wood, Chicago, Illinois 60620.

45. On information and belief, Carr received a solicitation substantially similar to Exhibit E.

46. In response to the solicitation, Carr had her loan refinanced with AGFI when she signed a new note on July 21, 1995. The amount financed was $2,083.26, the finance charge was $936.25, and the annual percentage rate was 35.94%. This note was secured by the same

miscellaneous personal property that secured the first two notes. Of the amount financed, $69.75 represented the premium for credit life insurance, $165.13 represented the premium for credit disability insurance, and $94.78 represented the premium for insurance on plaintiff's personal property.

47. Exhibit R, attached, is a copy of the note. Exhibit S, attached, is a copy of the Truth in Lending statement. Exhibit T, attached, is a copy of the security agreement.

48. The note provided that in the event of prepayment or acceleration, finance charges would be credited using the "Rule of 78's." Refund of unearned premiums on the insurance policies would also be computed using the Rule of 78's.

49. Had AGFI simply made the second loan for the additional amount which Carr was solicited to borrow, it would have cost Carr substantially less.

50. AGFI did not disclose to Carr, when she entered into the November 21, 1994 or March 6, 1995 transactions, that it would be substantially cheaper for her to simply obtain a second and third loan instead of refinancing the first two loans.

BESSIE L. CHALMERS

51. Bessie L. Chalmers ("Chalmers") is an individual who lives at 2211 E. 70 St., Chicago, Illinois 60649

52. On information and belief, Chalmers responded to the solicitation in her monthly statement (Exhibit V), which stated "YOU'RE INVITED TO BLUE RIBBON DAYS IN APRIL. PLEASE STOP BY AND SEE US.

WE'RE SHOWING OUR APPRECIATION FOR ALL OF OUR BLUE RIBBON CUSTOMERS THROUGHOUT APRIL WITH SPECIAL EVENTS AND BLUE RIBBONS SERVICE . . . WE COULD HAVE YOUR LOAN APPROVED IN LESS THAN AN HOUR," and contacted AGFI for a new loan.

53. The fair inference from this notice is that Chalmers, and others who received such notice in their monthly statements, would receive additional money by either an additional loan or addition to the existing account.

54. The fair inference from this notice is that Chalmers, and others who received such notice in their monthly statements, would not receive additional money by "flipping" of the current loan.

55. The notice did not disclose that AGFI actually intended to refinance the existing loans, or that the expense of doing so would greatly exceed the expense of obtaining an additional loan.

56. Chalmers obtained what she believed was a new loan, as indicated on Exhibit U, when, as indicated by Exhibit V, a substantial portion of the loan was used to pay the prior account.

57. The note provided that in the event of prepayment or acceleration, finance charges would be credited using the "Rule of 78's." Refund of unearned premiums on the insurance policies would also be computed using the Rule of 78's.

58. Had AGFI simply made the second loan for the additional amount which Chalmers was solicited to borrow, it would have cost Chalmers substantially less.

59. AGFI did not disclose to Chalmers, when she entered into the March 29, 1995 transaction, that it would be substantially cheaper for her to simply obtain a second loan instead of refinancing the first loan.

POLICIES AND PRACTICES COMPLAINED OF

60. AGC delegated responsibility to AGFC for preparation and approval of solicitations.

61. AGFC participated directly with the subsidiaries in the "flipping scheme" in that AGFC devised the scheme and directed its subsidiaries to implement it. AGFC prepared and approved the solicitations.

62. The subsidiaries, including AGFI, executed the policies and practices adopted by AGFC, with regard to their customers.

63. It was and is the policy and practice of AGFC to:

a. Repeatedly solicit existing loan customers by mail to borrow additional funds.

b. Use communications, such as Exhibits E and U, which lead the customer to believe that he or she is being offered a new and separate loan when in fact, that is not the case.

c. Provide existing loan customers with additional funds through refinancings of the original loans, rather than making new loans, with the result that the cost of the additional funds was inordinately and unconscionably expensive.

d. Concealing from or omitting to reveal to the borrowers the fact that the cost of obtaining addi-

tional funds through refinancing was immensely greater than the cost of obtaining an additional loan.

e. Market loans to mostly working-class borrowers who generally do not understand the computations necessary to determine the comparative costs of a new and separate loan and a refinancing.

64. AGFI and other subsidiaries carried out the policies and practices of AGFC.

65. Defendants have described their target customers as follows:

Target Group Lifestyle Description
Mid to Downscale

Blue-collar craftsman, factory workers, and laborers in low density satellite towns and suburbs of small industrial and manufacturing metros. (Exhibit W)

66. Approximately 60% of the defendants' consumer loans are with what defendants have termed "downscale" consumers. Exhibit W. The defendants' "Target Cluster Index" reveals that the top rated customer profiles include those who:

- Use chewing tobacco
- Listen to religious radio
- TV quiz & audience participation
- Eat at steak houses
- Listen to country music
- Watch TV daytime drama
- Bottom 20% newspaper reading
- Shocks installed by self
- Pro wrestling fans (Exhibit W)

While those persons least likely to do business with the defendants include those who have the following characteristics:

- Belong to a business club
- More than $10,00 stock in other company
- Epicurean magazines
- Go sailing
- American Express card
- Downhill skiers
- Buy traditional/contemporary jazz music
- Played tennis 10+ times last year
- Listen to classical music
- Keogh account (Exhibit W)

67. AGFC subsidiaries' customers do not understand that it is cheaper to obtain a second loan rather than refinance. The computations necessary to determine the comparative cost of the two loans are complex, requiring multiple applications of the "Rule of 78s" and similar rebate formulae (to the loan being refinanced and to each insurance policy issued in connection with that loan). AGFI markets its loans to working-class borrowers who generally do not understand these calculations.

68. These policies and practices continued for many years, continuing through the filing of this lawsuit.

CLASS ALLEGATIONS

69. This claim is brought on behalf of a class. The class consists of all persons who satisfy the following criteria:

a. They obtained credit from AGFI or any subsidiary of AGFC.

b. The AGFC subsidiary solicited them for additional extensions of credit, at a time when they were current on their loans.

c. The additional extension of credit was documented as a refinancing by the AGFC subsidiary.

d. One or more of the loans was outstanding within four years prior to the filing of this action.

70. The class is so numerous that joinder of all members is impractical. The class includes at least several thousand persons.

71. There are questions of law and fact common to the class, which questions predominate over any questions affecting only individual class members. These questions include:

a. Whether the practices complained of are unfair and deceptive or fraudulent business practices.

b. Whether defendants engaged in the scheme complained of.

c. Whether defendants engaged in a scheme or artifice to defraud, within the meaning of 18 U.S.C. §1341.

d. Whether the mails were used in furtherance of the scheme.

e. Whether AGFC conducted or participated in the conduct of the affairs of the enterprise(s) through a pattern of mail fraud, thereby violating 18 U.S.C. §1962(c).

f. Whether AGFI conducted or participated in the conduct of the affairs of the enterprise(s) through a pattern of mail fraud, thereby violating 18 U.S.C. §1962(c).

g. Whether John Does 1-10 conducted or participated in the conduct of the affairs of the enterprise(s)

through a pattern of mail fraud, thereby violating 18 U.S.C. §1962(c).

72. Plaintiff will fairly and adequately protect the interests of the class and subclass. She has retained counsel experienced in handling class actions and actions involving unlawful business practices. Neither plaintiff nor her counsel have any interests which might cause them not to vigorously pursue this action.

73. Plaintiff's claims are typical of the claims of the class and subclass, which all arise from the same operative facts and are based on the same legal theories.

74. A class action is a superior method for the fair and efficient adjudication of this controversy, in that:

a. Most class members are necessitous borrowers who are unaware that their rights have been violated and who lack the resources to pursue individual actions even if they understood their rights were violated.

b. The nature of the practice complained of—the imposition of modest overcharges on large numbers of individuals, resulting in large profits to defendant—is such as to make a class action essential.

c. Management of this class action is likely to present significantly fewer difficulties than those presented in many class actions, e.g., for securities fraud.

COUNT I - RICO

75. Plaintiff incorporates ¶¶ 1 - 74 by reference.

76. AGFC is a person as defined in 18 U.S.C. § 1961(3).

77. Each of the following is an enterprise as defined in 18 U.S.C. §1961(4): (i) AGC; (ii) the corporate group headed by AGC; (iii) AGFC, AGFI and other affiliated companies directly or indirectly owned by AGFC (the "AGFC Group").

78. The activities of each enterprise affected interstate commerce, in that much of the business they conducted involved interstate transactions. Among other things, many of the loans made by AGFC and its affiliates are made in states other than Illinois. Also, AGFC and AGC raise money on public securities markets and extends financing in approximately 40 states.

79. AGFC conducted or participated in the affairs of each of the enterprises described above through a pattern of mail fraud, in violation of 18 U.S.C. §§ 1962(c) and 1341.

80. AGFC devised and implemented a scheme or artifice to:

a. Repeatedly solicit existing unsophisticated loan customers to request additional funds from AGFI and other AGFC subsidiaries, using the United States Mails for that purpose.

b. Deliberately misleading customers into believing that they were going to receive a new distinct loan.

c. Provide existing loan customers with additional funds through refinancings of the original loans, rather than making new loans, with the result that the cost of the additional funds was inordinately and unconscionably expensive.

d. Concealing from or omitting to reveal to the borrowers the fact that the cost of obtaining addi-

tional funds through refinancing was immensely greater than the cost of obtaining an additional loan.

81. The scheme amounted to scheme or artifice to defraud within the meaning of the mail fraud statute. 18 U.S.C. §1341.

82. The United States mails were used in furtherance of the scheme, as follows:

a. Solicitation materials such as Exhibits E and U were sent to the debtors by mail.

b. Borrowers were invited to and did in fact make their unnecessarily expensive payments by mail. The use of the mails in this regard was foreseeable and intended by defendant AGFC.

83. In the case of plaintiff:

a. Her solicitation materials were received in the mail.

b. She paid by mail.

84. The scheme extended over a period of several years and involved numerous customers such as Emery, Gill, and Chalmers, who all, upon information and belief, received solicitations, and paid on their loans by mail, and thus constituted a "pattern of racketeering."

85. AGFC conducted the affairs of each enterprise defined above through such pattern of racketeering.

86. Plaintiff and each class member was injured in their property as a result of the scheme, in that they were charged unnecessarily expensive finance charges.

WHEREFORE, plaintiff requests that the Court enter judgment in her favor and in favor of the class and against defendant AGFC for:

a. Treble damages.

b. Attorney's fees, litigation expenses and costs.

c. For such other or further relief as the Court deems appropriate.

COUNT II - RICO

87. Plaintiff incorporates ¶¶ 1-86.

88. AGFI is a person as defined in 18 U.S.C. § 1961(3).

89. Each of the following is an enterprise as defined in 18 U.S.C. § 1961(4): (i) AGC; (ii) the corporate group headed by AGC; (iii) AGFC, AGFI, and other affiliated companies directly or indirectly owned by AGFC (the "AGFC Group").

90. The activities of each enterprise affected interstate commerce, in that much of the business they conducted involved interstate transactions. Among other things, many of the loans made by AGFC and its affiliates are made in states other than Illinois. Also, AGFC and AGC raise money on public securities markets and extends financing in approximately 40 states.Among other things, many of the loans made by AGFC and its affiliates are made in states other than Illinois. Also, AGC raises money on public securities markets and extends financing in all states.

91. The business activities of the enterprises include the acquisition and servicing of consumer credit obligations.

92. As described above, AGFI conducted or participated in the affairs of each of the enterprises described

above through a pattern of mail fraud, in violation of 18 U.S.C. §§ 1962(c) and 1341.

93. The United States mails were used on repeated occasions in furtherance of this pattern, in that:

a. Solicitation materials such as Exhibits E and U were sent to the debtors by mail.

b. Borrowers were invited to and did in fact make their unnecessarily expensive payments by mail. The use of the mails in this regard was foreseeable and intended by defendant AGFI.

94. It was the policy and practice of the AGFI, and its affiliates to execute the schemes as described above.

95. Plaintiff and the members of the classes suffered pecuniary injury from these violations.

WHEREFORE, plaintiff requests that the Court enter judgment in her favor and in favor of the classes:

a. For treble damages.

b. For attorney's fees, litigation expenses and costs of suit.

c. For such other or further relief as the Court deems appropriate.

COUNT III - RICO

96. Plaintiff incorporates ¶¶ 1-95. This count is asserted against the Does only.

97. The Does are persons as defined in 18 U.S.C. § 1961(3).

98. Each of the following is an enterprise as defined in 18 U.S.C. § 1961(4): (i) AGC; (ii) the corporate

group headed by AGC; (iii) AGFC, AGFI, and other affiliated companies directly or indirectly owned by AGFC (the "AGFC Group").

99. The activities of each enterprise affected interstate commerce, in that much of the business they conducted involved interstate transactions. Among other things, many of the loans made by AGFC and its affiliates are made in states other than Illinois. Also, AGFC and AGC raise money on public securities markets and extends financing in approximately 40 states. Among other things, many of the loans made by AGFC and its affiliates are made in states other than Illinois. Also, AGC raises money on public securities markets and extends financing in all states.

100. The business activities of the enterprises include the acquisition and servicing of consumer credit obligations.

101. As described above, the Does conducted or participated in the affairs of each of the enterprises described above through a pattern of mail fraud, in violation of 18 U.S.C. §§ 1962(c) and 1341.

102. As described above, the Does conducted or participated in the affairs of each of the enterprises described above through a pattern of mail fraud, in violation of 18 U.S.C. §§ 1962(c) and 1341.

103. The United States mails were used on repeated occasions in furtherance of this pattern, in that:

a. Solicitation materials such as Exhibits E and U were sent to the debtors by mail.

b. Borrowers were invited to and did in fact make their unnecessarily expensive payments by mail.

The use of the mails in this regard was foreseeable and intended by defendant AGFI.

104. It was the policy and practice of the Does, and their affiliates to execute the schemes as described above.

105. On information and belief, this policy and practice was carried out over a period of at least 5 years.

106. Plaintiff and the members of the classes suffered pecuniary injury from these violations.

WHEREFORE, plaintiff requests that the Court enter judgment in her favor and in favor of the classes:

a. For treble damages.

b. For attorney's fees, litigation expenses and costs of suit.

c. For such other or further relief as the Court deems appropriate.

COUNT IV – CONSUMER FRAUD ACT

107. Plaintiff incorporates ¶¶ 1 - 105 by reference.

108. AGFI and AGFC violated some or all of the following statutes prohibiting unfair or deceptive business practices:

Alabama Code §8-19-1
Alaska Statutes § 45.50.471
Arizona Rev. Stat. Ann. §44-1521
Arkansas Stat. Ann §4-88-101
California Business & Professions Code §§17200, 17500, Civil Code §1750
Colorado Rev. Stats. §6-1-101

Connecticut Gen. Stat. Ann. §42-110a
Delaware Code Ann. title 6 §§2531, 2511
D.C. Code Ann. §28-3901
Florida Stat. Ann. §501.201
Georgia Code Ann. §§10-1-370, 390
Hawaii Rev. Stats. §§480, 481A
Idaho Code §48-601
815 Illinois Compiled Statutes 505/1 et seq., 510/1 et seq.
Indiana Code Ann. §24-5-0.5-1
Iowa Code Ann. §714.16
Kansas Stat. Ann. §50-623
Kentucky Rev. Stat. §367.110
Louisiana Rev. Stat. §51:1401
Maine Rev.Stat. Ann. title 5, §206
Maryland Commercial Law Code Ann. §13-101
Massachusetts General Laws ch. 93A
Michigan Compiled Laws Ann. §445.901
Minnesota Stat. Ann. §§8.31, 325D.42, 325D.44, 325F.69
Mississippi Code Ann. §75-24-1
Missouri Rev. Stats. §407.010
Montana Code Ann. §30-14-101
Nebraska Rev. Stat. §§59-1601, 87-302
Nevada Rev. Stat. §§41.600, 598.360
New Hampshire Stat. Ann. §358-A:1
New Jersey Stat. Ann. §56:8-1
New Mexico Stat. Ann. §57-12-1
New York General Business Law §§349-50
North Carolina Gen. Stat. §75-1.1
North Dakota General Stat. §51-15-01
Ohio Rev. Code Ann. §§1345.01, 4165
Oklahoma Stat. Ann., title 15, §751, title 78, §51
Oregon Rev. Stats. §646.605
Pennsylvania Stat. Ann., title 73, §201-1
Rhode Island General Laws §6-13.1-1
South Carolina Code Ann. §39-5-10

South Dakota Cod. Laws Ann. §37-24-1
Tennessee Code Ann. §47-18-101
Texas Business and Commercial Code Ann. §17.41
Utah Code Ann. §§13-2-1, 13-5-1, 13-11-1
Vermont Stats. Ann. title 9, §2451
Virginia Code §59.1-196
Washington Rev. Code Ann. §19.86.010
West Virginia Code, §46A-6-101
Wisconsin Stat. Ann. §100.18, 100.20
Wyoming Stat., §40-12-101

109. Plaintiff believes that the Indiana statute may be applied to the entire class because the policies and practices complained of were devised and implemented from AGFC's headquarters in Indiana. However, plaintiff may rely on some of the other statutes.

110. Defendants engaged in the following unfair and deceptive acts and practices:

a. Pursuant to the policies and practices described above, AGFI enticed persons, including but not limited to plaintiff, to request and accept additional advances on existing loans by misrepresenting material facts concerning the additional advance and treatment of the existing loan.

b. Pursuant to the policies and practices described above, defendants enticed persons, including but not limited to plaintiff, to request and accept additional advances by concealing, suppressing, and/or omitting material facts concerning the additional advance and treatment of the existing loan.

111. These violations involved willful disregard of known legal rights for pecuniary gain, and were malicious.

WHEREFORE, plaintiff requests that the Court enter judgment in his favor and in favor of the class and against AGFI and AGFC for:

a. Compensatory and punitive damages.

b. Attorney's fees, litigation expenses and costs.

c. An injunction halting the practices complained of.

d. Such other and further relief as the Court deems appropriate.

Respectfully submitted,

/s/_____
Daniel A. Edelman

Daniel A. Edelman
Cathleen M. Combs
James O. Latturner
Danielle R. Gomez
EDELMAN & COMBS
135 S. LaSalle Street, Suite 2040
Chicago, Illinois 60603
(312) 739-4200
(312) 419-0379 (FAX)

Knox C. McLaney
MCLANEY & ASSOCIATES
509 S. Court Street
P.O. Box 4276
Montgomery, Alabama 36104
(334) 265-1282
(334) 265-2319

Supreme Court, U.S.
FILED
JUN 30 1998
CLERK

No. 97-1928

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

VERNA EMERY,

Petitioner,

—v.—

AMERICAN GENERAL FINANCE, INC.,
AMERICAN GENERAL FINANCE, CORP.,
and JOHN DOES 1-10,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

PAUL W. SCHROEDER
Counsel of Record
JAMES R. DALY
JAYANT W. TAMBE
JONES, DAY, REAVIS & POGUE
77 West Wacker Drive
Chicago, Illinois 60606
(312) 782-3939

Counsel for Respondents

23 pp

QUESTIONS PRESENTED

I. Whether this Court should deny review of the lower court's application of the well-settled pleading requirements of Fed. R. Civ. P. 9(b) to the factual allegations of the complaint, finding that Petitioner had failed to plead more than one instance of mail fraud and, thus, a pattern of racketeering activity.

II. Whether this Court should deny review of the fact-bound decision below, which correctly applied well-settled law and found that Petitioner failed to plead a viable RICO enterprise distinct from the alleged RICO person.

III. Whether this Court should deny review of the lower court's rejection of Petitioner's vague "John Doe" pleading, which ruling was fully consistent with the requirements of Rule 9(b) and the First Circuit's decision in *Oreto*.

STATEMENT PURSUANT TO RULE 29.6

Respondent American General Finance, Inc., an Illinois corporation, is a wholly-owned subsidiary of Respondent American General Finance, Corp., an Indiana corporation. Respondent American General Finance, Corp. is a wholly-owned subsidiary of American General Finance, Inc., an Indiana Corporation. Neither American General Finance, Inc. (Illinois), nor American General Finance Corp. (Indiana) have any non-wholly owned subsidiaries.

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED i

STATEMENT PURSUANT TO RULE 29.6 ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

STATEMENT 1

a. The Nature Of The Case 1

b. The Original Complaint 2

c. The First Appeal 3

d. The Amended Complaint 3

e. The Second Amended Complaint 4

f. The Dismissal Of The Second Amended Complaint . . 5

g. The Second Appeal 7

REASONS FOR DENYING THE WRIT 8

I. THE DECISION BELOW CORRECTLY APPLIED WELL-SETTLED LAW IN FINDING THAT EMERY HAD FAILED TO PLEAD MORE THAN ONE INSTANCE OF MAIL FRAUD. 8

II. THE DECISION BELOW CORRECTLY APPLIED WELL-SETTLED LAW IN FINDING THAT EMERY HAD FAILED TO PLEAD A VIABLE

RICO ENTERPRISE DISTINCT FROM THE ALLEGED RICO PERSON. 11

III. THE DECISION BELOW CORRECTLY REJECTED PETITIONER'S "JOHN DOE" CLAIM AND DOES NOT CONFLICT WITH THE FIRST CIRCUIT'S DECISION IN *ORETO*. 13

CONCLUSION 16

TABLE OF AUTHORITIES

CASES

Emery v. American General Finance, Inc.,
873 F. Supp. 1116 (N.D. Ill. 1994) 2

Emery v. American General Finance, Inc.,
71 F.3d 1343 (7th Cir. 1995) 3, 5

Emery v. American General Finance, Inc.,
938 F. Supp. 495 (N.D. Ill. 1996) 3, 4

Emery v. American General Finance, Inc.,
952 F. Supp. 602 (N.D. Ill. 1997) 5, 6

Emery v. American General Finance, Inc.,
134 F.3d 1321 (7th Cir. 1998) ..... *passim*

Emery v. American General Finance, Inc.,
No. 97 L 3093 (Cir. Ct. Cook Cty. Ill.) 6

Fitzgerald v. Chrysler Corp., 116 F.3d 225
(7th Cir. 1997) 12

H.J., Inc. v. Northwestern Bell Telegraph Co.,
492 U.S. 229 (1989) 8

Haroco, Inc. v. America National Bank Co.,
747 F.2d 384 (7th Cir. 1984), *aff'd*
on other grounds, 473 U.S. 606 (1985) 12, 13

Jaguar Cars, Inc. v. Royal Oaks Motor
Car Co., 46 F.3d 258 (3d Cir. 1995) 14

Michaels Bldg. Co. v. Ameritrust Co., N.A.,
848 F.2d 674 (6th Cir. 1988) 9, 10

New England Data Serv., Inc. v. Becher,
829 F.2d 286 (1st Cir. 1987) 9, 10

Reves v. Ernst & Young, 507 U.S. 170 (1993) 13

Richmond v. Nationwide Cassel, L.P.,
52 F.3d 640 (7th Cir. 1995) 13

Schiffels v. Kemper Fin. Serv., Inc.,
978 F.2d 344 (7th Cir. 1992) 9, 10

United States v. Oreto, 37 F.3d 739 (1st Cir. 1994) 14, 15

STATUTES AND RULES

18 U.S.C. § 1961(5) 8

18 U.S.C. § 1962(c) ..... *passim*

Fed. R. Civ. P. 11 ..... 6, 9

Fed. R. Civ. P. 9(b) ..... *passim*

BRIEF FOR THE RESPONDENTS IN OPPOSITION

Respondents American General Finance, Inc. ("AGFI") and American General Finance, Corp. ("AGFC") (collectively, "Respondents"), respectfully submit this brief in opposition to the Petition of Verna Emery for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

STATEMENT

Petitioner Verna Emery, despite having been afforded three opportunities to do so, could not state a claim that met the well-settled pleading requirements of Section 1962(c) of Title IX of the Organized Crime Control Act of 1970, Racketeer Influenced and Corrupt Organizations ("RICO"), and Rule 9(b) of the Federal Rules of Civil Procedure. In her petition for a writ of certiorari, Emery distorts beyond all recognition the ruling below, written by Chief Judge Posner for a unanimous panel, that affirmed the dismissal of her Second Amended Complaint. At bottom, and notwithstanding Emery's contentions to the contrary, the court below applied settled pleading standards to the factual allegations of Emery's complaint and concluded that those allegations failed to state a claim under RICO. That ruling was correct and plainly does not conflict with the rulings of any other federal courts of appeals. Nor is there any other "compelling reason" for this Court, in the exercise of its discretion, to grant review.

a. The Nature Of The Case

Emery's theory of the case was that, through allegedly misleading mailings, Respondents solicited loan customers to borrow money and then, instead of making a separate loan, refinanced their original loan and advanced additional funds pursuant to a new loan, which allegedly was economically disadvantageous to the customers. (Petition at 3; *see also* Second Amended Complaint, reproduced at pages 19 to 42 of Petitioner's Appendix ("App."), at App. 19, 29-30 (¶¶ 1, 60-

64).) Emery contended that this alleged "practice" was a "scheme or artifice to defraud" that violated the federal mail fraud statute. (App. 35 (¶¶ 81-83).) Based on these contentions, Emery purported to assert claims for violation of Section 1962(c) of RICO on behalf of herself and a putative class of similarly situated persons against defendants AGFI, AGFC (AGFI's parent company), and John Does 1-10. Emery also purported to assert claims against AGFI and AGFC for violation of "some or all" of the consumer fraud statutes of the fifty states and the District of Columbia.

A brief recitation of the procedural history of this matter is helpful to put the allegations of the Second Amended Complaint in context.

b. The Original Complaint

In her original Complaint, Emery named AGFI as the sole RICO "person" and claimed that she was deceived by an allegedly misleading mailing from AGFI. In conclusory fashion, Emery also claimed that AGFI had done the same thing to other of its customers. Emery alleged that AGFI devised and implemented the allegedly fraudulent scheme and conducted the affairs of each of the following enterprises through a pattern of racketeering activity: (i) American General Corporation ("AGC") (AGFC's ultimate parent holding company), and (ii) the corporate group headed by AGC. Based on those allegations, Emery's original Complaint purported to state a claim against AGFI for violation of Section 1962(c) of RICO.

The district court granted AGFI's motion to dismiss the original Complaint, finding that AGFI could not be liable under RICO for mail fraud because AGFI's mailing to Emery was, as a matter of law, neither deceptive nor misleading and AGFI had no duty to disclose to Emery the relative costs of a refinancing. *Emery v. American General Finance, Inc.*, 873 F. Supp. 1116, 1121-22 (N.D. Ill. 1994).

c. The First Appeal

The court of appeals reversed, finding that "[t]here is a state of facts consistent with the complaint that if proved would establish a violation of the mail fraud statute." *Emery v. American General Finance, Inc.*, 71 F.3d 1343,1348 (7th Cir. 1995) ("*Emery I*"). Nevertheless, the court specifically held that Emery had failed to plead a pattern of racketeering activity:

> [T]he plaintiff must prove a "pattern of racketeering" consisting of at least *two* separate criminal acts. *Where the acts are acts of fraud, the circumstances of each act must be pleaded with particularity*. . . . There are no names or dates or other details of transactions involving any other customer besides Emery. *These details . . . are necessary to identify a violation of RICO, which requires (in this case) more than one fraud and only one is alleged to have been perpetrated* against Emery herself.

Id. (citations omitted) (emphasis added). Therefore, the court concluded that dismissal of the Complaint was proper, but that Emery should have been given an opportunity to amend. *Id*.

d. The Amended Complaint

The Amended Complaint identified some of the details of the transactions of two other AGFI customers -- Tawanna Gill and Tonia Carr. That attempt fell short of the mark, however, because Emery failed to allege "that either of these customers received a misleading solicitation through the mail, or even made their own payments through the mail." *Emery v. American General Finance, Inc.*, 938 F. Supp. 495, 499 (N.D. Ill. 1996). Accordingly, the district court concluded that Emery had once again failed to plead a pattern of racketeering activity. *Id*.

The Amended Complaint also sought to impose RICO liability, not on AGFI as before, but instead on AGFC, for the very same conduct that had been previously alleged against its subsidiary, AGFI. Concluding that these amendments "work[ed] to [Emery's] detriment, not benefit," *id.* at 496, the district court held that Emery had failed to plead a RICO enterprise distinct from the alleged RICO person:

> The complaint alleges that all of the businesses are conducted in accordance with directions given and policy set by AGFC. *The complaint further alleges that the businesses are operated centrally without regard to their nominal existence*, and that it is AGFC that controls and operates all of the corporate group including AGC. In essence, plaintiff alleges that *the corporations ignore all legal formalities*. Accepting these allegations as true, as the court must, *AGFC is at all times conducting its own affairs, and not the affairs of AGC, leaving no distinction between the RICO person and the enterprise*. . . . Plaintiff has been unable to allege that the activities of AGFC are in any meaningful way different from those of the subsidiary AGFI, or the group of corporations together.

Id. at 498-99 (emphasis added).) Accordingly, the district court concluded that Emery failed to allege a RICO enterprise separate and distinct from the alleged RICO person.

e. The Second Amended Complaint

Although the Amended Complaint was initially dismissed with prejudice, Emery requested and was granted leave to amend yet again. For her third attempt to plead more than one instance of mail fraud, Emery alleged, entirely "on information and belief," that Gill and Carr -- two alleged additional "victims" -- received "solicitation[s] substantially similar" to

Emery's. (App. 24, 26 (¶¶ 33, 45).) The Second Amended Complaint also proffered Bessie Chalmers as an additional "victim," claiming "[o]n information and belief, [that] Chalmers responded to [a] solicitation in her monthly statement . . . contacted AGFI for a new loan . . . [and] obtained what she believed was a new loan, as indicated on Exhibit U, when, as indicated by Exhibit V, a substantial portion of the loan was used to pay the prior account." (App. 27-28 (¶¶ 52, 56).)

With respect to the alleged RICO persons, the Second Amended Complaint reshuffled the allegations of the two complaints that preceded it. This time around, Emery sought to hold both AGFI *and* AGFC liable as RICO persons and, in a move towards even more evasive pleading, added a RICO claim against ten "John Doe" defendants, who were described only as "the individuals responsible for devising the policies used each by AGC, AGFC, and AGFI and other subsidiaries." (App. 21 (¶ 12).) The Second Amended Complaint further charged that AGFC, AGFI and/or the "John Doe" defendants allegedly conducted or participated in the affairs of the same three enterprises identified in the Amended Complaint -- AGC, the AGC Group and the AGFC Group -- through a pattern of racketeering activity. (App. 35-36, 38 (¶¶ 85, 92, 100).)

f. The Dismissal Of The Second Amended Complaint

In dismissing the Second Amended Complaint, the district court held that Emery had once again failed to plead a pattern of racketeering activity with particularity as required by Rule 9(b), leaving her allegations "with the exact deficiencies identified by the Seventh Circuit [in *Emery I*]." *Emery v. Am. Gen. Finance, Inc.*, 952 F. Supp. 602, 605 (N.D. Ill. 1997). In particular, the court rejected Emery's attempt to avoid Rule 9(b) by pleading on "information and belief" and held that Emery had once again failed to allege that either Gill or Carr had received a misleading mailing. *Id.* at 604-05. As for Chalmers, the third alleged "victim," the district court held that the

exhibits to the Second Amended Complaint flatly contradicted Emery's allegations. *Id.* at 605.[1] The district court thus concluded that Emery had for the third time alleged only one act of mail fraud with particularity, and had therefore failed to plead adequately a pattern of racketeering activity. *Id.*

The district court also found that Emery had failed again to satisfy Section 1962(c)'s distinctiveness requirement by alleging nothing more than alleged RICO persons conducting their own corporate affairs rather than conducting, or participating in the conduct of, the affairs of any of the alleged enterprises. *Id.* at 605-606. Following dismissal of the federal claims with prejudice, the district court declined to exercise jurisdiction over the supplemental state consumer fraud claim. *Id.* at 606.[2]

g. The Second Appeal

On appeal, the Seventh Circuit affirmed the dismissal of Emery's Second Amended Complaint on both grounds identified in the district court's ruling. (App. 2.) In so ruling, the court

---

1 The court concluded that the alleged "solicitation" Chalmers received could not have played any role in her decision to borrow additional funds because (i) both the alleged "solicitation" contained in the monthly account statement and the alleged "new loan" Chalmers obtained in response to that "solicitation" were dated March 29, 1995, and (ii) the monthly account statement containing the alleged solicitation also contained a summary of the alleged "new loan." *Id.* Indeed, the district court noted that the Chalmers allegations bordered on a violation of Rule 11 of the Federal Rules of Civil Procedure. *Id.*

2 Emery has since refiled her state law claim, as a putative class action, in the Circuit Court of Cook County, Illinois. *Emery v. American General Finance, Inc.*, No. 97 L 3093 (Cir. Ct. Cook Cty. Ill.).

noted that "while it is possible that the deficiencies of the complaint could be cured by further pleading, the plaintiff has had three chances over the course of three years to state a claim and the district judge was not required to give her another chance." (*Id.* (citations omitted)).

Regarding Emery's efforts to plead more than one instance of mail fraud, the court of appeals concluded that, despite naming additional "victims," Emery had failed to plead what, if any, mailing those persons received. (*Id.* at 3.) The court noted that Emery's allegation that the additional victims had received a mailing "substantially similar" to that received by Emery was inadequate because those letters "could be substantially similar yet not misleading." (*Id.*) The court of appeals also rejected Emery's allegations regarding Chalmers because those allegations were defeated by the very documents upon which they purportedly were based. (*Id.* at 2-3.)

In concluding that Emery had failed to plead more than one instance of mail fraud with particularity, the court acknowledged the substantial pleading burden imposed by Rule 9(b). (*Id.* (pleading a RICO "pattern" requires Emery to "satisfy Rule 9(b) as it were twice"). However, the court rejected Emery's arguments that she could not have pleaded the necessary details because Emery had failed to make the necessary showing that she could not have obtained the missing information without discovery. (*Id.* at 3-4.) Thus, the court concluded that Emery had failed to carry her burden of alleging that she was entitled to relief from Rule 9(b)'s particularity requirements. (*Id.* at 4.)

With regard to Emery's "enterprise" allegations, the court recognized that Emery was seeking to impose RICO liability simply by showing that the pattern of predicate acts was committed by a firm that has agents or affiliates. "That is not enough," the court concluded, finding that Emery had failed to allege that the RICO defendants had conducted, or participated

in the conduct of, the affairs of the alleged RICO enterprises. (App. 5.) The court also rejected Emery's "John Doe" claim because it sought to impose RICO liability on the absurd assumption that, because corporations must act through natural persons, there *must be* natural persons who can be charged with a RICO violation whenever a corporation is alleged to have engaged in racketeering activities. (App. 7 (noting that the "John Doe" claim attempts to "truncate the statute in the manner that strikes us as inadmissible").)

REASONS FOR DENYING THE WRIT

In the decision below, a unanimous panel of the Seventh Circuit rejected Emery's third attempt to plead a RICO claim on two separate and independent grounds. In so doing, the court of appeals simply applied settled and uncontroversial law to Emery's pleadings. Consequently, there is nothing in this essentially routine, fact-bound case that merits this Court's review. The Petition should therefore be denied.

I. THE DECISION BELOW CORRECTLY APPLIED WELL-SETTLED LAW IN FINDING THAT EMERY HAD FAILED TO PLEAD MORE THAN ONE INSTANCE OF MAIL FRAUD.

Emery cannot and does not dispute that she was required to plead more than one instance of mail fraud. *See* 18 U.S.C. § 1961(5) (defining pattern of racketeering activity as consisting of two or more predicate acts); *H.J., Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 238 (1989) (RICO requires at least two predicate acts to plead a pattern of racketeering activity). She even admits, as she must, that the two or more instances of mail fraud "must be pleaded with particularity under Fed. R. Civ. P. 9(b)." (Petition at 15.) Her only quibble appears to be with the degree of specificity required by Rule 9(b) and the courts below. Thus, Emery contends that she could not provide the

necessary details because she was "precluded from taking any discovery concerning these matters" and because "the identities of the other recipients were completely within the purview of the defendants." (*Id.* at 16.) Not only is that contention wrong, but Emery offers no reason why the court of appeals' application of settled legal principles to this fact-pleading issue merits review by this Court.

1. The court of appeals recognized that Emery did not have the benefit of discovery. (App. 4.) Nevertheless, the court followed the general rule in finding that Emery could have satisfied Rule 9(b) by "showing that further particulars of the alleged fraud could not have been obtained without discovery." (*Id.*) On the basis of the facts alleged by Emery, however, the court of appeals concluded that she "did not make that showing." (*Id.*) The court of appeals' conclusion was based on the fact the complaint made no such allegation and Emery's counsel admitted at oral argument that she did not even attempt to obtain the necessary information. (*Id.*) Indeed, the court of appeals observed that Emery's counsel's "failure at the outset to appreciate the requirements of Rule 9(b) may in conjunction with the passage of time have doomed any efforts to find a second victim of the fraud." (*Id.*)[3]

2. The ruling below is entirely consistent with the cases Emery cites. (*See* Petition at 16 (citing *New England Data Serv., Inc. v. Becher*, 829 F.2d 286 (1st Cir. 1987); *Michaels Bldg. Co. v. Ameritrust Co., N.A.*, 848 F.2d 674 (6th Cir. 1988); *Schiffels v. Kemper Fin. Serv., Inc.*, 978 F.2d 344 (7th Cir. 1992).) One of those cases actually reached the same conclusion as the court below. *See Schiffels*, 978 F.2d at 353 (refusing to relax Rule 9(b) because plaintiff did not "suggest

---

[3] Requiring a plaintiff to conduct an investigation prior to filing a complaint is not as revolutionary as Emery appears to suggest. Rule 11 of the Federal Rules of Civil Procedure requires just that. *See* Fed. R. Civ. P. 11.

that she did not have access to the allegedly fraudulent documents"). In the other two cases, the courts relaxed Rule 9(b)'s pleading requirements only when the plaintiffs made the requisite showing that the particulars of the alleged fraud were peculiarly within the defendants' knowledge. *See Michaels Bldg. Co.*, 848 F.2d at 680 (Rule 9(b) is "relaxed where information is *only* within the opposing party' knowledge") (emphasis added); *New England Data Serv.*, 829 F.2d at 290-91 (noting that it was "seemingly impossible" for plaintiff to have known the missing facts). None of those cases supports Emery, who simply failed to make the requisite showing that she could not have obtained the missing information elsewhere. (App. 4.)[4]

3. As she did below, Emery continues to ignore the patent defects in her "pattern" allegations that the court of appeals identified. With respect to Chalmers, the court of appeals concluded that Emery's allegations of mail fraud were contradicted by the very documents she had attached to her complaint:

> [T]he only solicitation the lawyer has come up with is an innocuous couple of sentences in the monthly loan statement that [AGFI] sent this "victim"; moreover, as the statement carries the same date as the refinancing, it could not have caused this "victim" any harm.

(App. 2-3.) With respect to Gill and Carr, the court of appeals concluded that Emery had failed to plead mail fraud because she

---

[4] Nor could she have made such a showing. Whether any other persons, including the alleged "additional victims" --- Gill, Carr, and Chalmers -- actually received and were misled by a mailing from Respondents is a matter solely within their knowledge.

had failed to plead with particularity that they had received and were misled by a fraudulent mailing. (*Id.*)

4. The court of appeals ruling on this issue presents only a garden-variety application of the pleading requirements of Rule 9(b) to the "pattern" element of RICO. Even if there were some issue as to whether Emery had made a sufficient showing to be entitled to relief from Rule 9(b)'s requirements, Emery has not demonstrated that the resolution of this fact-specific issue merits review by this Court.

II. THE DECISION BELOW CORRECTLY APPLIED WELL-SETTLED LAW IN FINDING THAT EMERY HAD FAILED TO PLEAD A VIABLE RICO ENTERPRISE DISTINCT FROM THE ALLEGED RICO PERSON.

Emery contends that the court of appeals held that "a corporate subsidiary can *never* be a RICO person." (Petition at 9 (emphasis in original).) The court of appeals held no such thing. Emery's argument is based on a flagrant distortion of the ruling below and mischaracterizes the applicable decisions of the Seventh Circuit and other federal courts of appeals. In fact, the decision below merely applied well-settled legal precedents from this Court and several courts of appeals and concluded that Emery had not sufficiently pleaded (i) a RICO person distinct from the alleged RICO enterprises, or (ii) that the alleged RICO persons conducted or participated in the conduct of the enterprises through a pattern of racketeering activity.[5]

---

[5] Emery's Second Amended Complaint alleged *"nine different combinations"* of RICO persons and enterprises, comprised of various subsidiaries, parents and "corporate groups." (Petition at 5 (emphasis in original).) Emery argues that the court of appeals ruling was in error only insofar as it applied to five of these mix-and-match combinations -- those involving a RICO person that was a subsidiary and a RICO enterprise that was a

1. Instead of breaking new ground, as Emery suggests, the court of appeals merely rejected Emery's contention that:

> the requirement . . . that defendants conducted the affairs of an enterprise through a pattern of racketeering activity, 18 U.S.C. § 1962(c), is satisfied merely by showing that the pattern of predicate acts (the mail frauds in this case) were committed by a firm that has agents or affiliates.

(App. 5.) "[T]hat is not enough," the court held, because Emery was required to plead (i) that each of the RICO persons conducted the affairs of each of the RICO enterprises (and was not just conducting its own corporate affairs or "exercising power that is inherent in its ownership of wholly-owned subsidiaries"), and (ii) that each of the RICO enterprises was more than simply a combination of companies affiliated with a defendant corporation. (App. 5-6.)

2. In so holding, the court of appeals did not even come close to declaring that "a corporate subsidiary could *never* be a RICO person." (Petition at 9.) To the contrary, the court of appeals specifically acknowledged that a subsidiary, under the appropriate circumstances, would be a proper RICO person alleged to have conducted the affairs of a RICO enterprise comprised of its parent corporation and affiliates. (App. 6 (citing *Haroco, Inc. v. Am. Nat'l Bank Co.*, 747 F.2d 384, 400 (7th Cir. 1984), *aff'd on other grounds*, 473 U.S. 606 (1985).) *See also Fitzgerald v. Chrysler Corp.*, 116 F.3d 225, 228 (7th Cir. 1997) ("a manufacturer could use its dealers or other agents or affiliates in such a way as to bring about the sort of abuse at which RICO is aimed, in which event it might be possible to characterize the assemblage as a RICO enterprise"). Consequently, the decision below in no way conflicts with the string-cites of cases in the Petition that stand only for the

---

> parent corporation or a "corporate group" headed by a parent corporation. (Petition at 8.)

unremarkable proposition that individuals and "individual members of corporate groups *can* constitute RICO persons." (Petition at 12 (emphasis added).)

3. The decision below is also entirely consistent with the pleading requirements imposed by RICO itself. Section 1962(c) requires a plaintiff to allege that the RICO person is (i) distinct from the RICO enterprise *and* (ii) conducts, or participates in the conduct of, the affairs of the enterprise through a pattern of racketeering. *See Haroco, Inc. v. Am. Nat'l Bank Co.*, 747 F.2d 384, 400 (7th Cir. 1984), *aff'd on other grounds*, 473 U.S. 606 (1985); *Reves v. Ernst & Young*, 507 U.S. 170, 184-86 (1993) (to be liable under Section 1962(c), defendants "must participate in the operation or management of the enterprise itself" and "not just in their *own* affairs") (emphasis in original). *See also Richmond v. Nationwide Cassel, L.P.*, 52 F.3d 640, 646-47 (7th Cir. 1995) (noting that in the corporate context "it is more likely that the alleged enterprise is in reality no different from the association of individuals or entities that constitute the defendant or carry out its affairs").

4. The court of appeals was correct in affirming the dismissal of Emery's RICO claim because Emery's factual allegations failed to satisfy the well-settled "conduct or participate" and "distinctiveness" requirements of a Section 1962(c) claim under RICO. That ruling does not, in fact, conflict with any ruling from any other federal courts of appeals and presents no issue warranting review by this Court.

III. THE DECISION BELOW CORRECTLY REJECTED PETITIONER'S "JOHN DOE" CLAIM AND DOES NOT CONFLICT WITH THE FIRST CIRCUIT'S DECISION IN *ORETO*.

Emery claims that the court of appeals "appears . . . to have based its dismissal of the 'John Does' claims in part upon the notion that individual RICO defendants must be in positions

of corporate control" and contends that this holding is in conflict with that of the First Circuit in *United States v. Oreto*, 37 F.3d 739, 750 (1st Cir. 1994). (Petition at 15.) As with Emery's other arguments, this contention fails principally because Emery misstates the court of appeals holding to create a "conflict" where none exists.

1. What the court of appeals actually rejected was Emery's attempt to create a RICO claim out of whole cloth simply by assuming that, because a corporation can only act through natural persons, there must be "John Does 1-10" who can be charged with a RICO violation every time a corporation is charged with fraud:

> It is one thing to allege that criminals are using a corporation to commit crimes, a natural meaning to impress on the statutory language of conducting an enterprise's affairs through a pattern of racketeering activity, and another to assert merely that since the corporation's unlawful scheme must have been hatched by someone connected to the corporation, the scheme (provided it satisfies the statute's pattern requirement) violates RICO.

(App. 6.)

2. Far from holding that "individual RICO defendants must be in positions of corporate control" in order to be subject to RICO liability (Petition at 15), the court of appeals actually *agreed* with the general proposition that "an allegation that corporate officers or employees are using their corporation to perpetrate the frauds or other predicate acts satisfies the 'conduct the affairs through' requirement [of the Section 1962(c)]." (App. 6 (citing *Jaguar Cars, Inc. v. Royal Oaks Motor Car Co.*, 46 F.3d 258, 267-68 (3d Cir. 1995).) The court of appeals merely concluded that, in this case, Emery's allegations did not sufficiently allege how the Does "conducted

or participated" in the affairs of the alleged RICO enterprises. (App. 8.)

3. Contrary to Emery's contention, the decision below is entirely consistent with *United States v. Oreto*, 37 F.3d 739 (1st Cir. 1994). In fact, the Seventh Circuit actually cited *Oreto* with approval and specifically noted that a RICO defendant need *not* be an owner or even a member of top management in order to be liable for conducting the affairs of an enterprise through a pattern of racketeering activity. (App. 7.) The court of appeals simply concluded that the "conduct or participate" requirement was not satisfied in this case because Emery failed to allege that the Does did *anything*. (App. 8.) Indeed, merely mimicking the statutory language, all that Emery alleged here was that the Does "devis[ed]" undescribed "policies" and "conducted or participated in the affairs" of the three alleged enterprises "through a pattern of racketeering." (App. 21, 38 (¶¶ 12, 101-102).)

4. Taken a very short step to its logical conclusion, the illusory pleading employed by Emery would enable any plaintiff to transform virtually any individual claim of fraud against a corporation into a federal racketeering charge:

> There can be no corporate fraud without a deviser, that is without a human inventor, so that if "devisers" are RICO violators there would be a RICO violation whenever a corporation engaged in a pattern of racketeering activity -- and thus automatically -- even though the statute makes the conduct of or participation in the corporation's affairs a separate element of liability.

(App. 8.) The court of appeals was, therefore, entirely correct to reject the "John Doe" claim. There is no authority to the contrary and there is no basis presented for review by this Court.

CONCLUSION

For all the reasons stated above, Respondents American General Finance, Inc. and American General Finance Corp. respectfully request that the Court deny the petition for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

PAUL W. SCHROEDER
Counsel of Record
JAMES R. DALY
JAYANT W. TAMBE
JONES, DAY, REAVIS & POGUE
77 WEST WACKER DRIVE
CHICAGO, ILLINOIS 60606
(312) 782-3939

Counsel for Respondents

Dated: June 29, 1998

(3)

Supreme Court, U.S.
FILED
SEP 22 1998
OFFICE OF THE CLERK

No. 97-1928

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

VERNA EMERY,

Petitioner,

v.

AMERICAN GENERAL FINANCE, INC., AMERICAN GENERAL FINANCE CORP., and JOHN DOES 1-10,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

DANIEL A. EDELMAN
Counsel of Record
CATHLEEN M. COMBS
JAMES O. LATTURNER
JAMIE S. FRANKLIN
EDELMAN & COMBS
135 South LaSalle Street
Suite 2040
Chicago, IL 60603
(312) 739-4200
Attorneys for Petitioner

Midwest Law Printing Co., Chicago 60610, (312) 321-0220

9 pp

TABLE OF CONTENTS

PAGE

TABLE OF CITED AUTHORITIES ii

INTRODUCTION 1

ARGUMENT 1

I. THE SEVENTH CIRCUIT'S DECISION PRECLUDES PLAINTIFFS FROM SEEKING RELIEF UNDER THE RICO STATUTE AGAINST CORPORATE SUBSIDIARIES THAT COMMIT FRAUD 1

II. THE SEVENTH CIRCUIT IMPROPERLY PLACED MS. EMERY IN THE VERY "CATCH-22" SITUATION THAT IT PURPORTED TO REJECT 3

CONCLUSION 6

TABLE OF CITED AUTHORITIES

Cases PAGE(S)

Emery v. American General Finance, Inc.,
134 F.3d 1321 (7th Cir. 1998) ..... *passim*

Hubbard v. United States,
514 U.S. 695 (1995) 3

Michaels Building Company v. Ameritrust Company, N.A., 848 F.2d 674 (6th Cir. 1988) .. 5

New England Data Serv., Inc. v. Becher,
829 F.2d 286 (1st Cir. 1987) 5

Schiffels v. Kemper Fin. Serv., Inc.,
978 F.2d 344 (7th Cir. 1992) 5

United States v. Oreto,
37 F.3d 739 (1st Cir. 1994) 4

Statutes

18 U.S.C. §1691(3) 2

Fed.R.Civ.P. 9(b) 3, 5

INTRODUCTION

The petitioner, Verna Emery, seeks a writ of certiorari in this case to resolve conflicts of law created by the Seventh Circuit's opinion in *Emery v. American General Finance, Inc.*, 134 F.3d 1321 (7th Cir. 1998).

The Seventh Circuit's decision precludes *corporate subsidiaries* from constituting RICO "persons." Because the decision renders it impossible for a subsidiary to constitute a RICO person, it contradicts the plain language of the RICO statute and conflicts with decisions of eight Circuit Courts of Appeal.

Ms. Emery offers this Reply in Support of Petition for Writ of Certiorari to respond to new points raised in the opposition brief of respondents American General Finance, Inc. and American General Finance Corp. (collectively, "respondents").

ARGUMENT

I.

THE SEVENTH CIRCUIT'S DECISION PRECLUDES PLAINTIFFS FROM SEEKING RELIEF UNDER THE RICO STATUTE AGAINST CORPORATE SUBSIDIARIES THAT COMMIT FRAUD.

The Seventh Circuit's opinion in this case rejected the plain language of the RICO statute by effectively holding that a corporate subsidiary can *never* be a RICO "person." In practical terms, the Seventh Circuit's holding means that a plaintiff can no longer seek relief under the RICO statute against a subsidiary member of a corporate family that commits fraud. Now, for example, a large, reputable corporation's smaller subsidiary

can orchestrate a fraudulent scheme and carry it out under the protective wing of its parent corporation, because, in the Seventh Circuit, it cannot be sued for RICO violations.

Such a holding cannot be reconciled with the plain language of the RICO statute, which unambiguously states that a RICO person can be "any individual or entity capable of holding a legal or beneficial interest in property." 18 U.S.C. §1691(3).

Respondents' brief provides little opposition to Ms. Emery's petition for a writ of certiorari. Rather, respondents present page after page of *factual* background, presumably hoping to portray the Seventh Circuit's decision as routine and fact-bound. Respondents address the main point of Ms. Emery's brief in five short paragraphs that merely recite the Seventh Circuit's holding and state summarily that the Seventh Circuit decision was correct.

The defect in the Seventh Circuit's logic is a mistaken analogy between corporations that operate with subsidiaries and corporations that operate with internal divisions. The Seventh Circuit based its reasoning in this case on the idea that corporate subsidiaries serve the same purposes as corporate divisions. Because a corporation can choose to conduct its activities either through its own divisions or through subsidiaries, and because corporate *divisions* cannot constitute RICO persons, the Seventh Circuit reasoned corporate *subsidiaries* that engage in a pattern of racketeering activity similarly *cannot constitute RICO persons*. The Seventh Circuit stated:

> There is no allegation that by using subsidiaries rather than divisions the AGF group somehow made it easier to commit or conceal the fraud of which the plaintiff complains.

Slip Op., p. 6. In practice, of course, there are distinct differences between corporate divisions and separate, free-standing subsidiary corporations. Petitioner is not aware of any other context in which corporate divisions and corporate subsidiaries are treated alike simply because they carry out similar functions.

In direct contravention of its plain language, the Seventh Circuit limited the RICO statute via an inapt analogy that bears no relationship to the language or intent of Congress. When Congress has spoken clearly, the plain language of the statute prevails. *Hubbard v. United States*, 514 U.S. 695, 708 (1995) (courts should give effect to "plain language of an Act of Congress, particularly when the Legislature has specifically defined the controverted term").

II.

THE SEVENTH CIRCUIT IMPROPERLY PLACED MS. EMERY IN THE VERY "CATCH-22" SITUATION THAT IT PURPORTED TO REJECT.

Because Ms. Emery did not have the opportunity to take discovery in this case, she did not know which individuals devised the fraudulent activities on behalf of the corporate subsidiary. The pleading requirements of RICO and Fed.R.Civ.P. 9(b) placed Ms. Emery in an impossible position: the District Court had barred her from taking discovery pending its decision on respondents' motion to dismiss, yet it dismissed her claims

against the "John Doe" defendants because she could not identify them by name and allege that they *controlled* their corporations:

> the individual defendants are not alleged to control the corporation alleged to have committed the frauds that constitute the RICO violation, or a corporate division or other identifiable branch or unit that they somehow carved out from the legitimate corporate hierarchy and made their own little bailiwick. They are alleged merely to have devised the fraud . . . so that if "devisers" are RICO violators there would be a RICO violation whenever a corporation engaged in a pattern of racketeering activity—and thus automatically—even though the statute makes the conduct of or participation in the corporation's affairs a separate element of liability.

Slip Op., p. 8. The Seventh Circuit, then, based its dismissal of the John Does' claim in part upon the position that individual RICO defendants must be in positions of corporate control. Such a holding conflicts directly with the Third Circuit's decision in *United States v. Oreto*, 37 F.3d 739, 750 (1st Cir. 1994) ("one may 'take part in' the conduct of an enterprise by knowingly implementing decisions, as well as by making them").

Similarly, the Seventh Circuit held Ms. Emery to an impossible standard by holding that she failed to allege a pattern of racketeering activity because she *could not identify* others who received the same letter by name and, therefore, failed to plead other instances of fraud with particularity. Although the Seventh Circuit acknowledged that Ms. Emery was precluded from taking

any discovery concerning these matters and that Fed. R.Civ.P. 9(b) is "satisfied by a showing that further particulars of the alleged fraud could not have been obtained without discovery," Slip Op., p. 4, it nevertheless refused to reverse the District Court's dismissal of the complaint.

Respondents seize upon the Seventh Circuit's statement that Ms. Emery "didn't explore the possibility of obtaining from the defendants or other sources, without discovery, the identity of other recipients of the form letter . . . ." Slip Op., p. 4. What "other sources" besides formal discovery exist in such a scenario? It is hardly within the realm of possibility that respondents would have agreed to *informally* produce information to Ms. Emery's attorneys after the District Court stayed discovery.

Ms. Emery established that the form document she received constituted mail fraud. Because the identities of other recipients were completely within the purview of the defendants, she satisfied the pleading requirements of Fed.R.Civ.P. 9(b) by alleging that the other class members received the same form letter. *New England Data Serv., Inc. v. Becher*, 829 F.2d 286 (1st Cir. 1987); *Michaels Building Company v. Ameritrust Company, N.A.*, 848 F.2d 674 (6th Cir. 1988); *Schiffels v. Kemper Fin. Serv., Inc.*, 978 F.2d 344 (7th Cir. 1992).

CONCLUSION

For all the reasons stated above, petitioner Verna Emery respectfully requests that the Court issue a writ of certiorari to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

DANIEL A. EDELMAN
Counsel of Record
CATHLEEN M. COMBS
JAMES O. LATTURNER
JAMIE S. FRANKLIN
EDELMAN & COMBS
135 South LaSalle Street
Suite 2040
Chicago, IL 60603
(312) 739-4200

Attorneys for Petitioner

Dated: September 21, 1998